

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 226.

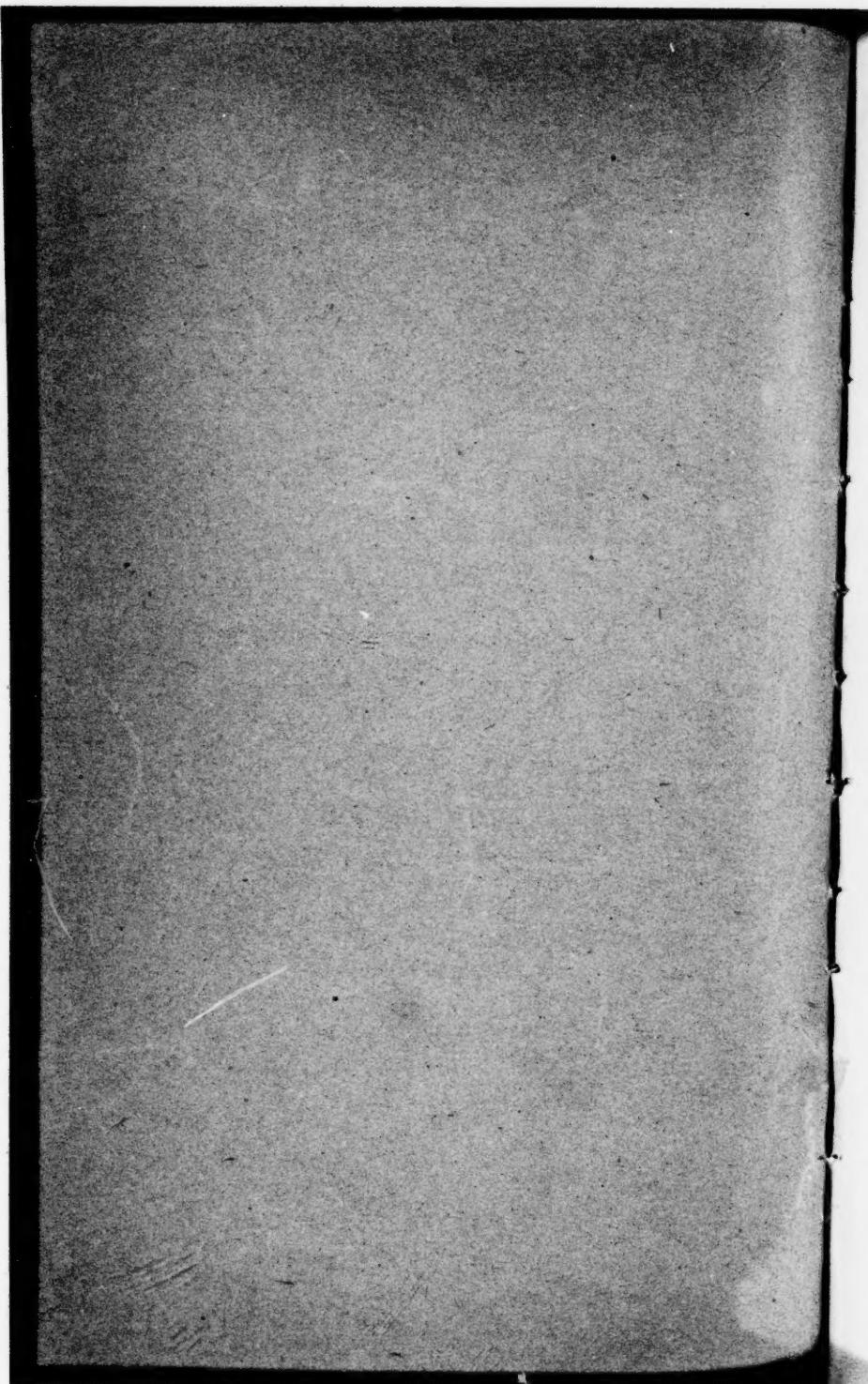
**CHICAGO AND ALTON RAILROAD COMPANY, PLAINTIFF
IN ERROR,**

**vs.
NATHANIEL T. KIRBY.**

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MARCH 9, 1910.

(22,057)



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IN ERROR,

v/s.

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1 At a Supreme Court, Begun and Held at Springfield, on Tuesday, the First Day of December, in the Year of Our Lord One Thousand Nine Hundred and Eight, Within and for the State of Illinois.

Present.—James H. Cartwright, Chief Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Guy C. Scott, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, Clerk.

Be it remembered, to-wit on the Thirteenth day of January A. D. 1909, the same being one of the days in vacation after the term of Court aforesaid the record of the proceedings in the Circuit Court of Sangamon County and the Appellate Court of Third District was filed by appellant Chicago & Alton Railroad Company in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

No. 6540.

N. T. KIRBY, Appellee,
vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal from Third Dist.

2 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas, before the Hon. James A. Creighton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey) at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the sixth day) of January in the year of our Lord one thousand nine hundred and eight:

Present:

Hon. James A. Creighton, Judge.
Frank L. Hatch, State's Attorney.
Charles Werner, Sheriff.
S. T. Jones, Clerk.

Be it remembered that on the 26th day of April A. D. 1906, there was filed in the office of the Clerk of said Sangamon County Circuit Court, a certain Precipe: which said Precipe is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

Circuit Court, May Term, A. D. 1908.

NATHANIEL T. KIRBY
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Action of Assumpsit.

From \$3000 to \$5000.

Damages, \$5000.

The Clerk will issue summons in the above entitled cause, directed to the Sheriff of said county, returnable to the May term A. D. 1906.

ALBERT SALZENSTEIN,
Plaintiff's Attorney.

Springfield, April 26, 1906.

3 — do hereby enter — security for all costs which may accrue in the above cause.
Dated this — day of —, 190—.

Approved —, A. D. 190—.
—, Clerk.

Gen. No. 20684, Sangamon County Circuit Court. — Term, 1906. Nathaniel T. Kirby vs. C. & A. R. R. Co. Assumpsit. Filed Apr. 26, 1906. S. T. Jones, Clerk. Praecepit A. Salzenstein, Plaintiff's Attorney. Fee Book 44, page 404.

And afterwards towit on the 26th day of April A. D. 1906 there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain Declaration; which said Declaration is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

In the Circuit Court Thereof to the May Term, 1906.

Nathaniel T. Kirby, plaintiff by A. Salzenstein, his attorney complains of the Chicago & Alton Railroad Company of a plea of trespass on the case on promise:

For that whereas said defendant on to-wit: January 24, 1906, and during said time at to-wit the County aforesaid was a common carrier of goods, horses, stock and passenger for hire, then doing business (under the name of the Chicago & Alton Railway Com-

pany) and as such operated and ran a line of railroad from the City of East St. Louis to the City of Chicago, Illinois, passing through the City of Springfield in said County of Sangamon and made connection with and transferred its cars on its road to various other common carriers along the line of its said railroad, to be carried by said latter on their said lines, and on the day and year first aforesaid by its authorized agent in consideration that the plaintiff would ship a certain car load of high bred trotting horses

over its road which it knew he was going to ship to New York

4 City that month to be sold at the great horse sale of high bred trotting and pacing stock to be held during said month at Madison Square Garden in the said last named City, then and there promised said plaintiff that it would arrange and agree that said stock would be promptly carried and delivered so as to be carried to New York on the fast stock train on the Michigan Central Railroad with which it connected at Joliet, Illinois, known as "The Horse Special," and would have said car load of horses carried through to New York as aforesaid for the sum of \$170.60, and plaintiff relying upon said promises accepted said offer and agreed to ship the said stock aforesaid consisting of Fourteen (14) head of high bred trotters as proposed and offered by defendant, and did thereafter on to-wit January 15, 1906, notify said defendant that he would so ship and deliver it for shipment on January 24, 1906, said horses to be carried and transported to New York on the terms and in the manner proposed and agreed by defendant as aforesaid, and defendant did then and there on to-wit January 22nd, 1906, agree and undertake to have said car load of horses promptly carried and delivered so that the same should be delivered so that the same should be carried and transported on the said fast stock train of the Michigan Central Railroad known as the "Horse Special" to New York for the total sum of \$170.60, transportation charges from Springfield to New York, and plaintiff avers that in reliance on the said promises and undertakings of the defendant in that behalf as aforesaid did on to-wit January 24, 1906 at Springfield in said County of Sangamon deliver said horses to said defendant for transportation as aforesaid under the said terms and agreements aforesaid, and the defendant did then and there receive and take them for transportation as aforesaid; on the terms and agreement aforesaid and plaintiff avers that it then and there became

5 and was the duty of the defendant to have carried the same

and to have promptly delivered same to the said Michigan Central Railroad Company so that said horses could have been carried by said latter company on said fast train known as "The Horse Special" but that the defendant wholly disregarding and neglecting its duty in that behalf, did not so deliver the same to the Michigan Central Railroad Company so that said horses could be carried on said Horse Special to New York which if done said horses would have reached New York on the morning of January 27, 1906 at or about 7 o'clock but neglected and failed to do, whereby by reason of such neglect and failure to deliver in time said plaintiff was obliged to make arrangements to have them

carried to New York the best way he could which was by inferior and slower means of transportation, whereby said stock was delayed in transportation and did not reach New York until January 29, 1906 at or about 12 o'clock at noon, and too late to be put in proper shape for exhibition and sale at the said horse sale at Madison Square Garden as was contemplated by the parties at the time plaintiff made his aforesaid agreement and contract with defendant and by reason of such delay and inferior transportation all of said horses were damaged and depreciated in value and several of them became sick and one of them seriously sick. See amendment to declaration.

*Note.—Stricken out by
amendment to declaration*

(And none of said horses brought as much as they would (have done if they had been carried on the Horse Special as (had been contracted for them, so as to have had the advantage of quick transportation. Such difference in amount (averaging in the case of thirteen (13) of said Horses (\$150.00 per head and amounting in the case of the other (which was sick to \$1000.00 and in addition, plaintiff was (obliged to and did pay \$200.50 for such inferior transportation being \$29.90 in excess of the stipulation price under (the contract for transportation to the damage of the
By amendment \$5000.00
(plaintiff of \$3000.00 and therefore he brings this suit.)

ALBERT SALZENSTEIN,
Plaintiff's Attorney.

6 And afterwards to-wit on the 26th day of April A. D. 1906, there issued out of the office of the Clerk of said Sangamon County Circuit Court a certain summons; which said summons together with the endorsements of the Sheriff thereon is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

To the People of the State of Illinois to the Sheriff of Sangamon County, Greeting:

We command you to summons Chicago and Alton Railroad Company if to be found in your county, to appear before the Circuit Court of Sangamon County, on the first day of the next term thereof to be holden at the Court House in the City of Springfield, on the first Monday in the month of May A. D. 1906 to answer unto Nathaniel T. Kirby in an action of Assumpsit Damages \$3,000.00—Amend \$5000 and hereof make due return to our said Court as the law directs.

Witness, S. T. Jones, Clerk of said Court and the Judicial Seal thereof at Springfield this 26th day of April A. D. 1906.

[CIRCUIT COURT SEAL.]

S. T. JONES, Clerk.

Summons.

Sangamon County Circuit Court, to May Term, A. D. 1906.

NATHANIEL T. KIRBY
v.
C. & A. R. R. Co.

Fees:

Service65
Copy10
Mileage10
Return10
<hr/>	
Total.....	.95

Filed Apr. 26, 1906.

S. T. JONES, *Clerk.*
A. SALZENSTEIN,
Plaintiff's Atty.

STATE OF ILLINOIS,
Sangamon County, ss:

I have served the within writ on the within named Chicago and Alton Railroad Company by reading the within to W. P. Eggleston, Freight Agent of Chicago and Alton Railroad Company and at the same time delivering to the said W. P. Eggleston a true copy of the within writ this 26th day of April A. D. 1906. The President of Chicago & Alton Railroad Company not found in my county.

B. H. BRAINERD, *Sheriff.*

7 And afterwards to-wit on the 27th day of April A. D. 1906, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain copy of account sued on; which said copy of account is in the words and figures as follows, to-wit;

Copy of Account.

Chicago & Alton R. R. Co. to Nathaniel T. Kirby, Dr.

To damages and loss occasioned by breach of contract to 13 horses as stated in the declaration filed in this cause at \$150.00 each.....	\$1950.00
To do. occasioned to one horse sickness, etc.....	\$1000.00
To excess payment over contract price of shipment 1 car trotter horses.....	29.90
<hr/>	
Total	\$2979.90

And afterwards to-wit on the 9th day of May A. D. 1906 the same being one of the term days of the May term A. D. 1906 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILWAY COMPANY, Defendant.

Assumpsit.

On motion of the defendant by its attorneys leave is hereby given it to plead by the 17th inst.

And afterwards to-wit on the 16th day of May A. D. 1906 there was filed in the office of the clerk of said Sangamon County Circuit Court a certain general issue; which said general issue is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

In the Circuit Court, to the May Term, A. D. 1906.

C. & A. R. R. Co.
ats.

NATHANIEL T. KIRBY.

8 And the defendant by Patton & Patton, its attorneys, comes and defends the wrong and injury, when, etc. and says that it did not promise in manner and form as the plaintiff has above thereof complained against it;

And of this the defendant puts itself upon the country etc.

PATTON & PATTON,
Defendant's Attorneys.

And afterwards to-wit on the 16th day of April A. D. 1907 the same being one of the term days of the March term A. D. 1907 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILWAY COMPANY, Defendant.

Assumpsit.

And now come the parties hereto by their respective attorneys and by agreement of the said parties this cause is continued on statement on file, at defendant's costs.

It is therefore ordered and adjudged by the Court that the said plaintiff have and recover of and from the said defendant, his costs by him at this term herein expended and that he have execution therefor.

And afterwards to-wit on the 3rd day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain stipulation as to certain facts; which said stipulation is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, to the January Term, A. D. 1908.

N. T. KIRBY

v.

CHICAGO & ALTON RAILROAD CO.

Stipulation as to Certain Facts.

9 It is hereby stipulated by and between the parties hereto by their respective counsel;

I.

That the defendant did not advise the Michigan Central Railroad Company at Joliet, Illinois, at any time prior to January 25th 1906, that the horses of the plaintiff were consigned from Springfield, Illinois, by way of Joliet, care of Fast Horse Train out of Chicago on Michigan Central Railroad January 25th and notice was not given prior to departure of the first train out of Joliet on the M. C. R. on the morning of Jan. 25th.

II.

That Mr. Mohr, Freight Agent of the Michigan Central Railroad Company at Joliet received no notice from the defendant of the arrival of the horses at Joliet, until about ten o'clock A. M. January 25th, 1906.

III.

That car No. 6082 A. P. H. Co. containing Mr. Kirby's horses was billed by the Michigan Central R. Co. to 130th St. Station New York.

IV.

That said car arrived at 130th st. Station on the morning of January 29th, 1906.

V.

That Mr. Kirby called at 130th S. Station at about 8 A. M. January 29th, 1906, and signed an order to have the car moved

to Fiss, Doerr and Carroll's stables at 36th St. and 11th ave. and at his request, car was so rebilled.

VI.

That a switch engine was immediately sent for, which engine delivered the car at Fiss, Doerr and Carroll's stables at 12.30 P. M. January 29th.

VII.

That the horses were there unloaded and were there kept for about twenty-four hours.

10

VIII.

That the horses were delivered at Fasig-Tipton's stables late in the afternoon of Tuesday, January 30th.

IX.

That proof can be made that the joint interstate tariff, rate sheets and official classification which were on file in the freight depot of defendant at Springfield, Illinois, at the time of the making of the contract of shipment had been duly filed with the Interstate Commerce Commission and published in accordance with the rules of such Commission, and that such proof shall be considered as made.

And it is stipulated that copies thereof may be used in evidence in this cause, without the certificate and seal of the Secretary of said Commission, and that such copies shall not be objected to for or on account of absence of proof of due filing and publication or other matter of form.

Dated this first day of February A. D. 1908.

SALZENSTEIN & J. M. GRAHAM,

Attorney- for Plaintiff.

PATTON & PATTON,

Attorney- for Defendant.

And afterwards towit on the 3rd day of February A. D. 1908, the same being one of the term days of the January Term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Assumpsit.

And now come the parties hereto by their respective attorneys and on motion of the plaintiff by his attorney leave is hereby given him to amend his declaration and increase the amount of ad damnum to Five Thousand dollars (\$5000.00) On motion leave is also given the plaintiff to amend the preceipe, summons and account.

11 And the issues herein being fully made up this cause is called for trial, and on motion it is ordered by the Court that a jury come to try the said issues.

Whereupon on call of the Clerk there came a jury of twelve men as follows to-wit:

A. H. Wilson, A. W. Sappington, W. T. Mulligan, James Ellinger, Mike Hagney, Ed. Vancil, Walter Baird, Lindsay Cunningham, Sam Davis, James Gibbons, Arthur Smith, Wm. Miller, Jr., who were duly elected, tried and sworn, well and truly to try the issues joined and a true verdict render according to the evidence.

And the said jury having heard the evidence in part and the time for adjournment having arrived, it is ordered by the Court that the further hearing of this cause be resumed Wednesday morning February 5th, 1908.

And afterwards to-wit on the 3rd day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain amended statement of account; which said amended statement of account is in the words and figures as follows to-wit:

Chicago and Alton Railroad Company, to N. T. Kirby, Dr.

An itemized statement of the damages occasioned to said Kirby in the shipment of fourteen head of high class trotters and pacers by breach of special contract entered into January 18, 1906, for the transportation of the same to New York on the "Horse Special" now in suit.

Lou Blake (2), 229 $\frac{1}{4}$ by Blake, 213 $\frac{1}{4}$ by Mutwood 218 $\frac{3}{4}$ Dam Emile conductor by Conductor 214 $\frac{1}{4}$, entered in \$47,000.00 worth of stakes and paid up. "Made sick in transportation."

Sold for \$425.00.

Market Value \$2,500.

 Damages \$2075.00.

12 Cornelia Bel 210 trotting 217 $\frac{1}{4}$ pacing at two year-old, by Onward 225 $\frac{1}{4}$ by George.

Wilkes 222. Dam Bel Onward 219 $\frac{1}{4}$ by St. Bel 224 $\frac{1}{2}$ by Electioneer.

Sold for \$2600.00 Market value \$3,000. Damages \$400.00.

Easter Bel trial 224 $\frac{1}{2}$ by Alberton 209 $\frac{1}{4}$, Dam Bel Onward 219 $\frac{1}{4}$ by St. Bel 224 $\frac{1}{2}$ by Electioneer. Bred to Boreal 215 $\frac{3}{4}$ Bobells by Electioneer.

Sold for \$285.00 Market Value \$325.00 Damages \$10.00.

Woodford Bel trial 228 $\frac{1}{2}$ by Alberton 209 $\frac{1}{4}$ Dam Bel Onward 219 $\frac{1}{2}$ Bred to Boreal 215 $\frac{3}{4}$ by Robells.

Sold for \$325.00 Market Value \$375.00 Damages \$50.00.

Bell Morton by Counsellor 221 $\frac{1}{4}$ by Onward 225 $\frac{1}{4}$ Dam Bel Onward 219 $\frac{1}{2}$ by St. Bel 224 $\frac{1}{2}$ Bred to Boreal 215 $\frac{3}{4}$.

Sold for \$225.00 Market Value \$265.00 Damages \$10.00.

Veronique (3) by Cresceus 202 $\frac{3}{4}$ The Champion Trotting Stallion of the world. Dam Cornelia Bel 210 by Onward 225 $\frac{1}{4}$.

	Sold for \$1225.00 Market Value \$1400.00 Damages \$175.00. Amt. Brt. Forwd. 2780.00.
	Black Filly (3) by Cresceus 202½ Trotting Stallion (World's record) Dam Woodford Bel by Alberton 209¼.
	Sold for \$700.00 Market value \$800.00 Damages \$100.00.
	Rhythmic Bel (2) record 224¼ by Rhythmic 206¼ Dam Cornelia Bel 210 by Onward 225¼.
	Sold for \$1000.00 Market value \$3000.00 Damages \$2000.00.
	Brown Colt (2) by Red Tell 208¾ by Red Heart 219 Dam Bell Morton by Counsellor 221¼.
	Sold for \$200.00 Market value \$230.00 Damages \$30.00.
13	Brown colt by Tregantly trial of 205½ by Simmons 228 Dam Easter Bells by Alverton 209¼ (Weanling).
	Sold for \$160.00 Market value \$185.00 Damages \$20.00.
	Brown Filly by Tregantly (as above) Dam Woodford Bells by Alberton 209¼ (Weanling).
	Sold for \$100.00 Market value \$115.00 Damages \$15.00.
	Red Star (trial 220) by Beansant 206½ by Bow Bells. Dam Reply by Princeton 219¾.
	Sold for \$220.00 Market Value \$500.00 Damages \$280.00.
	Bertha Craven (5) by Guy Corbitt by Guy Wilkes 215¼ Dam Isabel by Aladdin 227½.
	Sold for \$250.00 Market value \$290.00 Damages \$40.00.
	4265
	To overcharge agreed price of transportation..... \$29.90
	Extra feed, trouble and expense by delay..... 75.00
	Total \$4369.90

And afterwards to-wit on the 4th day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain Amendment to Declaration; which said Amendment is in the words and figures as follows to-wit:

Amend Declaration

By striking out after the words "seriously sick" in the fifth line from the bottom of page 2 of the declaration all that follows and adding in lieu thereof the words that by reason of such inferior transportation, delay, sickness etc. said horses did not bring as much on the said market as they otherwise should and would have done, such difference in amount of market price at said time and place amounting to a large sum of money, towit \$4900.00 and in addition plaintiff was obliged to and did pay \$200.50 for such inferior transportation being \$29.90 in excess of the stipulated price under the said contract for transportation aforesaid to the damage of the plaintiff of five thousand dollars therefore he brings this suit, etc.

A. SALZENSTEIN,
J. M. GRAHAM,
Att'ys for Plaintiff.

And afterwards to-wit on the 5th day of February A. D. 1908, the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Assumpsit.

And now on this day come again the parties hereto by their respective attorneys, and the jury in this cause also comes, and the further hearing of this cause is resumed.

And the said jury having heard further evidence, and the time for adjournment of Court having arrived it is ordered by the Court that the further hearing of this cause be resumed tomorrow morning.

And afterwards to-wit on the 6th day of February A. D. 1908 the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,

vs.

CHICAGO & ALTON RAILROAD CO., Defendant.

Assumpsit.

And now on this day come again the parties hereto by their respective attorneys, and the jury in this cause also comes, and the further hearing of this cause is resumed.

And the said jury having heard the remaining evidence and the arguments of counsel thereon, and receiving the instructions 15 of the Court retire in charge of officers of this Court to consider of their verdict.

And afterwards to-wit on the 7th day of February A. D. 1908 the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Assumpsit.

And now come again the parties hereto by their respective attorneys, and the jury in this cause having duly considered of their verdict are returned into open court by the officers of this court having them in charge and for their verdict say:

We the jury find the defendant guilty and assess plaintiff's damages at the sum of Four Thousand Two Hundred Dollars (\$4200.00).

And the said defendant by its attorney enters its motion for a new trial.

And afterwards to-wit on the 17th day of February A. D. 1908 there was filed in the office of the Clerk of said Sangamon County Circuit Court, a certain Motion for a New Trial, which said Motion is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
County of Sangamon:

In the Circuit Court, to the January Term, A. D. 1908.

NATHANIEL T. KIRBY
vs.
CHICAGO & ALTON RAILWAY COMPANY.

Motion for a New Trial.

And the defendant, by its attorneys, moves the Court to set aside the verdict heretofore rendered in the above entitled 16 cause, and to grant a new trial herein, and as grounds for such motion, shows to the Court here the following that is to say:

1. The Court improperly admitted on the trial improper evidence offered by the plaintiff.
2. The Court improperly overruled various motions made by the defendant during the cause of the trial to exclude from the jury improper evidence theretofore offered by plaintiff and admitted by the Court.
3. The Court improperly refused to admit proper evidence offered by the defendant.
4. The Court improperly qualified the effect of evidence offered by and admitted on behalf of the defendant by oral statements to the jury concerning the same.
5. The Court improperly refused at the close of all the evidence to instruct the jury to find the issues for the defendant.
6. The Court improperly denied the motion made by defendant at the close of all the evidence to exclude the evidence from the jury and to instruct the jury to find the issues for the defendant, and improperly refused the written instruction to the jury presented therewith, to find the issues for the defendant.
7. The verdict is against the law.
8. The verdict is against the evidence.
9. The verdict is against the law and the evidence.
10. The verdict is against the laws of the United States, and particularly against and in contravention of the Act of Congress of February 4th 1887 and the amendments thereto known as the "Interstate Commerce Act" or the "Act to regulate Commerce."
11. The amount of the verdict is excessive.

12. The Court improperly refused the instructions offered and asked by the defendant, and each of them, being numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

17 13. The Court improperly gave to the jury the instructions offered and asked by the plaintiff and each of them, being numbered 1, 11, and 111.

Wherefore, etc.

PATTON & PATTON,
Attorneys for Defendant.

And afterwards to-wit on the 20th day of February A. D. 1908, the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILROAD Co., Defendant.

Assumpsit.

And now come the parties hereto by their respective attorneys and now this cause coming on to be heard in open Court upon the motion of the defendant for a new trial heretofore entered, and the Court having heard the arguments of counsel thereon, and not being fully advised, takes time to consider.

And afterwards to-wit on the 22nd day of February A. D. 1908, the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILROAD Co., Defendant.

Assumpsit.

And now on this day come again the parties hereto by their respective attorneys, and the Court being now fully advised, overrules the motion of the defendant for a new trial, to which ruling of the Court the said defendant by its attorneys excepts.

18 It is therefore ordered and adjudged by the Court that the said plaintiff have and recover of and from the said defendant the sum of Four Thousand Two Hundred Dollars (\$4200.00) being the amount of plaintiff's damages heretofore assessed by the jury in this case, as well as his costs, by him herein expended and that he have execution therefor.

To which order and judgment of the Court the said defendant by its attorneys then and there excepts and prays an appeal of this cause to the Appellate Court in and for the Third Judicial District

of the State of Illinois, which is allowed by the Court upon condition that the said defendant enter into bond in the penal sum of Four Thousand Six Hundred Dollars (\$4600.00) to be approved by the Clerk of this Court in seventy (70) days. Bill of exceptions in seventy (70) days.

And afterwards to-wit on the 29th day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court, a certain Appeal Bond which said Appeal Bond is in the words and figures as follows to-wit:

Know all men by these presents, that we, the Chicago and Alton Railroad Company formerly Chicago & Alton Railway Company and National Surety Company and National Surety Company of State of Illinois, are held and firmly bound unto Nathaniel T. Kirby in the penal sum of Forty Six Hundred Dollars for the payment of which, well and truly to be made we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated at Chicago this 2nd day of March in the year of our Lord one thousand nine hundred and eight.

19 The condition of the above obligation is such, that whereas the said Nathaniel T. Kirby did on the 22nd day of February A. D. 1908, at a term of the Circuit Court of Sangamon County, State of Illinois, holden within and for said county, obtain a judgment against the above bounden Chicago & Alton Railway Company for the sum of Forty two hundred dollars and costs of suit from which judgment, the said Chicago and Alton Railway Company has prayed for and obtained an appeal to the Appellate Court of said State of Illinois.

Now if the said The Chicago and Alton Railroad Company formerly Chicago & Alton Railway Company shall duly prosecute said appeal, and shall, moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against it the said Chicago & Alton Railway Company in case the said judgment shall be affirmed in the said Appellate Court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE CHICAGO AND ALTON RAILROAD
COMPANY. [SEAL.]

Formerly, Chicago & Alton Railway Company.

[CORPORATE SEAL.]

By GEO. H. KOSS, Vice-President.

[SEAL.]

Attest:

H. E. R. WOOD,
Ass't Secretary.

Taken and approved by me this 29th day of February, A. D. 1908.

[CORPORATE SEAL.]

NATIONAL SURETY COMPANY. [SEAL.]
CHARLES S. CRAIN, *Resident Vice-President.*
WALTER FARADAY,
Resident Assistant Secretary.

S. T. JONES,
Clerk of the Circuit Court.

Sangamon Circuit Court, January term 1908. Nathaniel T. Kirby v. Chicago & Alton Railway Co. Appeal Bond to the Appellate Court. Filed Feb. 29, 1908 S. T. Jones, Clerk. Patton & Patton, Attorneys at Law, Springfield, Ill.

20 STATE OF ILLINOIS,
Sangamon County, ss:

In the Circuit Court, January Term, 1908.

Filed Apr. 7, 1908. S. T. Jones, Clerk.

NATHANIEL T. KIRBY
vs.
CHICAGO & ALTON RAILWAY COMPANY.

Bill of Exceptions.

Be it remembered that on the trial of this cause at this term of said court, before the Honorable James A. Creighton, Judge presiding, with a jury, the plaintiff to sustain the issues on his behalf introduced in evidence, that is to say:

Stipulation offered in evidence as follows.

STATE OF ILLINOIS,
County of Sangamon:

In the Circuit Court, to the January Term, A. D. 1908.

N. T. KIRBY
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Stipulation as to Certain Facts.

It is hereby stipulated by and between the parties hereto by their respective counsel:

I.

That the defendant did not advise the Michigan Central Railroad Company at Joilet Illinois at any time prior to January 25th 1906

21 that the horses of the plaintiff were consigned from Springfield, Illinois, by the way of Joliet care of Fast Horse Train out of Chicago on Michigan Central Railroad, January 25th, and notice was not given prior to departure of the first train out of Joliet on the M. C. R. on the morning of January 25th.

II.

That Mr. Mohr, Freight Agent of the Michigan Central Railroad Company at Joliet received no notice from defendant of the arrival of the horses at Joliet, until about ten o'clock A. M. January 25th, 1906.

III.

That car No. 6082 A. P. H. Co. containing Mr. Kirby's horses was billed by the Michigan Central R. Co. to 130th st. Station New York.

IV.

That said car arrived at 130 St. Station on the morning of January 29th, 1906.

V.

That Mr. Kirby called at 130th S. Station at about 8 A. M. January 29th, 1906, and signed an order to have the car moved to Fiss, Doerr and Carroll's stables at 36th st. and 11th Ave. and at his request, car was so rebilled.

VI.

That a switch engine was immediately sent for, which engine delivered the car at Fiss, Doerr and Carroll's stable at 12.30 P. M. January 29th.

VII.

That the horses were there unloaded, and were there kept for about twenty-four hours.

VIII.

That the horses were delivered at Fasig-Tipton's stables late in the afternoon of Tuesday, January 30th.

IX.

That proof can be made that the joint interstate tariff rate sheets and official classification which were on file in the freight depot of defendant at Springfield, Illinois, at the time of the making the contract of shipment had been duly filed with the Interstate Commerce Commission and published in accordance with the rules of such commission, and that such proof shall be considered as made.

And it is stipulated that copies thereof may be used in evidence in this cause, without the certificate and seal of the Secretary of

said commission, and that such copies shall not be objected to for or on account of absence of proof of due filing and publication or other matter of form.

Dated this first day of February A. D. 1908.

A. SALZENSTEIN &
J. M. GRAHAM,
Attorneys for Plaintiff.
PATTON & PATTON,
Attorneys for Defendant.

NATHANIEL T. KIRBY being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows to-wit:

- Q. State your name to the jury?
A. Nathaniel T. Kirby.
Q. What is your age Mr. Kirby?
A. Sixty One.
Q. Where do you live?
A. In Springfield.
Q. How long have you lived here?
A. I have lived here about four years, between four and five years.
Q. Where did you live previous to coming here?
A. Jacksonville about eleven years.
Q. How long did you live there?
A. About eleven years.
23 Q. Where did you live before that?
A. Jerseyville, Illinois.
Q. How long did you live there?
A. All my life up to that time.
Q. What is and has been your business?
A. Well, sir, I have farmed and developed horses, run a horse shoeing shop, and buy and sell horses.
Q. Explain to the jury what you mean by developing horses, and tell them how long you have been in that business?
A. I commenced developing horses in 1866, and I have worked them for carriage purposes, and racing purposes, such as that, and I have raced horses every year since 1866 but one.
Q. What do you mean by racing and developing horses ever since?
A. Well, I have prepared my own stock, and stock for others for the races, and worked them for show rings, and to make good saleable horses of them, and shipped them to these fancy markets to get the prices.
Q. Have you driven any of these horses you have prepared in races?
A. O, yes, yes.
Q. To what extent?
A. In this same lot of horses?
Q. No, generally, first?

A. O, perhaps half that I handled I handled for racing purposes.

Q. Had you ever shipped any horses previous to this lot to markets?

A. Yes sir, a great many, I think probably six lots to New York previous to this.

Q. Did you ship any anywhere else?

A. Yes sir, Chicago.

24 Q. What kind of horses were those you shipped on those other occasions?

A. Just fancy horses, high priced horses.

Q. Now with regard to these horses, were they entered for any special sale previous to your shipment?

Objection by defendant to the entering.

Q. We will follow that up by showing the agreement; tell the jury in your own way about the shipment of these fourteen head of horses about which this suit is brought in regard to the making of the contract, who it was made with and what was said about it?

A. Well sir, I commenced quite a while previous to the sales that I shipped to New York, to handle, getting the horses ready, they are high priced horses, and there is only just a few horses that are handled always—

Objected to by defendant, that is the general custom of what he does. Objection sustained by the court.

Q. What I ask you Mr. Kirby is, to tell us first what arrangements you made with the C. & A. Railroad Company, or any of its agents, and with whom and how you came to make the arrangement and what it was?

A. It was up on the northeast corner of the square I met Mr. Connor, the ticket agent of the C. & A. road at that time, Will Connors, he says are you busy, I says yes, I am busy getting a lot of horses ready for New York, are you going to New York with them, yes, let us ship them will you, yes, I will ship over your road provided I can make the right arrangements and so on, I want to ship over a road that I can get the horses in as quick as possible, well, let us ship them I says all right, he says I will send Mr. Eggleson over to see you, I said there is no use, Eggleson don't seem to care about my stock or my wants, and there is no use to send him over, he says all right I will send the stock agent I didn't

know his name at that time and have him talk the matter

25 over with you, I says all right, and in a few days, probably

the next day, Mr. Stuttsman come over and introduced himself as the stock agent of the C. & A. Railroad, he says I come over to see you, Will Connors had me come over to see you, or some agent, that he received notice from them he said to see about the load of horses, I said all right and he says come with me over to the C. & A. Railroad will you, I says yes and I told him that Mr. Eggleson would not give me satisfaction from the fact he was either too busy or did not care or something, and we went over there, and he says now Mr. Eggleson you fix this man out and ship those horses for him and see what he wants &c. and you order a car for

him, I says no, don't you order me a car until you get me a rate. I said I have a rate from the other two roads, the Wabash and the Illinois Central, you get me a rate, he said all right, and I went out of the office. The next day I called up Mr. Eggleson and I says this is Kirby, have you got that rate, and he says I entirely forgot it. I says don't forget it any more for I mean business; the next day I called him up and he says I have got you that rate, I says all right what is it, he says \$170.60 to New York, I says all right, you can order a car, and a few days later Mr. Stuttsman came in and he says to me you are shipping just at the right time Kirby, I says how is that, and I had stated to him I wanted to get on the fast horse train, I understood there was a fast horse train from Chicago to New York, and that I wanted to get on it.

Q. Did you tell him anything about what you were shipping, the kind of horses?

A. Yes sir, I wanted to get on that fast horse train, and I says I have got a fine lot of horses, I have got the best I ever loaded, and the highest priced lot that ever left Springfield, the reason I wanted to go on the fast horse train, I didn't know what they called it at that time, that was the second time I saw him I think,

26 he came into my shop and he says you are shipping just at the right time Kirby, I says how is that, he says well the horse special leaves Chicago Tuesdays, Thursdays and Saturdays of each week, we will ship you Wednesday night just as you have mapped out and get you to Joliet at six o'clock in the morning, he says the train men will pick you up and take you over to Lake on the Michigan Central, and the horse special when it comes along will pick you up at five o'clock I says do I have to say to five o'clock, he says yes and you get onto the fast horse special, I says have you made every arrangement to ship me on that horse special, he says you will go all right, I turned to him and I says if you have not made every arrangement to ship me on that horse special we will go and ship over the Wabash, and I knew that route, he says we will guarantee we will put you on the horse special.

Objected to by defendant. Mr. Stuttsman was no such agent to have power to make such contract, and had no such power either from the railroad company or under the law, we object to the testimony of guarantee, and object to it as a means of proving a contract for the same reason a lack of power under the rules of the company and under the law.

The COURT: No guarantee is charged in the declaration, and the statement cannot be received as tending to prove guarantee, but the court at this time sees no reason why the statement may not go along as tending to prove a contract, to the extent it may ultimately tend to prove a contract, if at all.

To which ruling of the court the defendant by its counsel then and there excepted.

27 Q. You have stated what he said in regard to having made arrangements?

A. Yes sir.

Q. Where did that conversation take place?

A. In my shop.

Q. About what time?

A. Some time I think it was during the Monday, sometime during the day, but I think it was Monday before I shipped Wednesday.

Q. Anybody present during that conversation?

A. Yes sir.

Q. Who?

Q. Charles Sengo and my foreman stood close by.

Q. What is his name?

A. S. Gilmore.

Q. Now, after that conversation what was done, if anything, towards making the shipment?

A. They ordered me to get the car loaded at two o'clock because they had to run the car out of the Fair Grounds at four o'clock in the afternoon; we loaded at two o'clock and I went home to get ready. I got my lunch and came back, and came back to the shop between five and six o'clock, I run over to the railroad and did not find Mr. Eggleson in and I went out and found the yard master and asked him what about that car of horses I says for New York, he says where is it, and you are to put me on this train tonight; well, he got up there just in time to put it on the train, and we pulled out in ten minutes after the car got down here, fifteen minutes after the car got down into the yard.

Q. Did you go into the office at all?

A. I went in to get the contract, I asked for Mr. Eggleson when I got in there, and he said Mr. Eggleson is not in, he says who is this, I says Kirby, he says your contract is made out for you to sign, it was partly opened and stuck through the window for me

28 to sign, he says sign that, and then turned it over and says sign there, I says to him are all arrangements made at Joliet about this load, yes he says, it is marked here on this way bill, I says that goes to Joliet, have they made arrangements ahead, he says they have attended to that, so I got the contract and went and got in the car.

Q. Did you accompany the stock?

A. Yes sir.

Q. What time did you and the stock get into Joliet?

A. When we got to where I supposed was Joliet I got up and looked out of the window and saw it was Joliet, I looked at my watch and I saw it was just six o'clock, and the first thing I did then was to make a run over to the restaurant to get a pot of coffee and right back to the car, and I inquired then for the Michigan Central office, at that time in the year and that time in the morning it is pretty dark, not many people on the street, finally a man showed me where the Michigan Central was, there was nobody in, but somebody in the other room, pretty soon the janitor come out making fires, and I asked him where the night man was, he said he was in the yard somewhere, so I went out and went down to the car and stayed there until seven o'clock probably, I think just seven, and I went back to the Michigan Central, nobody in yet, but soon

afterwards the clerks commenced to come in, I asked for the agent, the freight agent, they said he would be in soon and I think he arrived somewhere about eight o'clock, and I told him my business, and I says when are you going to get me over to Lake.

Objection by defendant to any conversation between the Michigan Central Agent and Mr. Kirby, as being entirely outside of the controversy here.

Mr. SALZENSTEIN: Excepting in so far as to find out whether any arrangement had been made by the C. & A. with the Michigan Central about this stock.

29 MR. PATTON: That is in the stipulation on file.

MR. SALZENSTEIN: Now Mr. Kirby, you say you saw Mr. Mohr the freight agent for the Michigan Central at Joliet?

A. Yes sir.

Q. Did you say anything to him about this car of yours?

Objected to by defendant.

Q. I am not asking what was said, but if he said anything about it?

The COURT: What is the purpose of it?

Mr. SALZENSTEIN: To find out whether or not, the purpose is to show what was said to Mr. Mohr about this car and what arrangements were found made towards getting this car on its way.

MR. PATTON: We object to it as wholly immaterial.

The COURT: I suppose you want to show he learned from Mr. Mohr that no arrangement had been made for taking care of this stock, is that the idea?

MR. SALZENSTEIN: Yes, that is what I want to show.

The COURT: The plaintiff, may without giving the details of any conversation with Mr. Mohr, disclose whether he learned from Mr. Mohr that no arrangements had been made or notice given, then he may go along and tell what he and Mr. Mohr did after that point.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. You may state whether or not you learned from Mr. Mohr whether any arrangement had been made or notice given by the C. & A. in regard to the shipment of this stock on the fast train to Joliet?

A. I did sir.

Q. What was said by him to you in regard to that matter?

Objected to by defendant. Objection sustained by the court, the court remarking he may state what he learned.

Q. What did you learn from him as to whether arrangements had been made?

A. I learned that he had never been notified about this car, or never knew anything about it, where it came from, whose it was or where it was billed to, I learned that from Mr. Mohr.

30 Q. Now did you state to Mr. Mohr where this car was to go?
A. Yes sir.

Q. After you made that statement to Mr. Mohr what did he do, if anything, towards taking steps to forward this car?

A. I stepped out and got a friend of mine, and he come in and introduced me to Mr. Mohr, and he says Mr. Mohr, help this man out, he is a friend of mine and he says I will do it.

Objection by defendant to the conversation.

The COURT: The details of the conversation are not material.

Q. You need not go into details, tell what Mr. Mohr did, if anything?

A. He stepped out and tried to get an engine, an extra one to take me over, I says I will pay you for it if you can get it.

Objected to by defendant. Objection sustained by the court.

A. He come back in and he says there is but one engine here and I can't let that go; now I says can't you get me on a passenger train, he says I will try it, and he did work with them to get me on a passenger train, but the objection was that there was no hot air pipes through this car, and it could not be put on a passenger train, he says you are a day late, we got that car too late to put it on that train, that takes water at the station over to Lake, therefore we will have to put you on a freight train and take you there, the freight that comes at six o'clock in the afternoon.

Objected to by defendant, and ask that the latter part of the statement as to what Mr. Mohr said be stricken.

The COURT: The objection is sustained, the valuable part of this, if there is any value to it, is that this man was making efforts to get his stuff away, and he may tell what he did and what Mr. Mohr did without going into the details of the conversation. Mr.

31 Mohr was not your agent and this man was his own servant, and he must exercise diligence from the time he got notice even on his theory of the case.

Q. Now when did you leave Joliet on your way to Lake?

A. At six o'clock that evening, Thursday evening about six o'clock.

Q. What time did you get to Lake?

A. I think it was just twelve o'clock at night, midnight.

Q. At what time did you leave Lake on any train on the Michigan Central?

A. I think we was picked up at two o'clock in the morning.

Q. The morning of the 26th?

A. The morning of the 26th, yes sir.

Q. And how did you proceed along?

A. Well sir, part of the time we were running, part of the time we was not.

Objected to by defendant as having no relevancy or materiality on the charge of this declaration, as to any negligent or improper management of the train of the Michigan Central Railroad Com-

pany, whether part of the time they were running and part of the time were not.

The COURT: The declaration charges that he had a special agreement with the defendant, that they should connect his car with this Michigan Central at Joliet, and he charges the breach of that contract, and that damages resulted from that breach, now I don't see any impropriety in his disclosing in what manner damages resulted from that breach, it seems to me if his theory of the case is sound in law or fact, up to this time it is proper for him to disclose how his stock was treated, what the details were, if there were details, I am inclined to think the objection is not well taken.

To which ruling of the court the defendant by its counsel then and there excepted.

32 Q. Tell in detail how the train was proceeding?

Objected to by defendant. Objection overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

A. The train stopped of course, they put me on the meat train, and they stopped at every large city from Lake to New York to ice up on the meat train.

Q. How long would it stop when it stopped?

A. O, at different times, it stopped different lengths of time, for instance at Windsor, we got there at noon, and they run me out at about six o'clock at night, they run me over to East Buffalo, and we stayed there from one o'clock until six o'clock in the evening before we started out.

A. One o'clock in the afternoon?

A. Yes sir.

Objected to by defendant, this declaration is a declaration for breach of a special contract to catch a special train now we cannot be held to account for such non-proximate result as that this train was negligently handled the train he actually did catch was negligently handled.

The COURT: You don't quite grasp the idea I had in mind, he charges a breach of what he says was a special contract to get his car to Joliet in time to connect with the Michigan Central Fast Horse train, now he discovers when he gets to Joliet there is a breach of that contract; now from that time forward he has got to exercise the very best diligence he can to get his stuff on with as little loss as possible, so he may tell what efforts he made to go forward, and what obstructions he met with in his efforts, and ultimately if his case is sound in both law and fact, ultimately

33 what loss resulted from it, it seems to me it is in the field of competent evidence. Primarily you are not responsible for any negligence of these other roads, but if his case is sound in both law and fact and he is doing the best he can to make the loss as little as possible, and loss does follow, he must show two things, first, that he is doing the best he could and by reason of things he

could not control loss did follow that of course makes it necessary to tell the obstructions he met with in his progress.

Mr. GRAHAM: We are not claiming the management of this meat train was negligence at all, we are proceeding rather on the theory he had the right to go on the horse special and we have a right to show how he went, and we have a right to show how the train we had to take went.

The COURT: That is the theory on which I am ruling, attempting to show you did the best you could when you discovered that the contract was broken and that in taking this train you had to submit to these delays. I am admitting it upon that theory, I am not letting it go to the jury upon the theory of negligence, but it was the best way he could get to go.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Now why was the delay, you say you left in the evening?
A. Yes sir.

Q. What day was that?

A. I think that was about Saturday, I won't say whether Friday night or Saturday.

Q. Well now from East Buffalo was there any delays?
A. Yes sir.

Q. Where?

A. We laid up from Sunday about noon until eight o'clock at night at Albany.

Q. And from Albany was there any other delay?

34 A. Yes sir, quite a delay at Schenectady.

Q. How long did you lie up there?

A. I don't know just how long, I think about four or five hours to the best of my knowledge.

Q. Then what time did you get into Schenectady and what time did you leave?

A. I can't remember that, I just remember they stopped, &c.

Q. What time did you get into New York, 130th street?

A. Between seven and eight o'clock in the morning Monday morning January 29th.

Q. Explain this matter of 130th street?

A. I will explain that when they made out my bills of the Michigan Central at Joliet I says we are to ship to 33rd street, and they said 130th street, I said do you know, and they said yes, we have billed other cars there several times, I says I don't know but it strikes me—

Objection by defendant to this conversation with regard to rebilling this stock at Joliet with which we had nothing to do.

Mr. SALZENSTEIN: It is stipulated when this car reached 130th street sometime in the morning of the 29th it was sent forward from 130th street to the stables of Fiss, Doer & Company. Now we want to show how it came to be sent to 130th street instead of being sent to Fiss, Doer & Company stables, to show we were not negligent in all.

Mr. PATTON: We think it is entirely immaterial to us, we were not negligent in any respect that caused this stuff to be billed incorrectly, our billing shows proper billing.

The COURT: I think it is material on the theory we are proceeding on for him to show he exercised all diligence and care he could.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Well, what did you say as to the place they were to be shipped?

35 A. I said I don't know now what the number is, but put Fiss, Doer & Carroll in that bill and it will go to his stables. I always ship to his stables and unload, they said they didn't know such place but we will put it on. I says put Fiss, Doer & Carroll, he says we will ship them all right, but he didn't put it on, immediately when I got into New York at 130th street I found I was four or five miles from Fiss, Doer & Company and I immediately went to the office and told them I should have been put to Fiss, Doer & Carroll and thought I was going to land there, he says no, it is four miles away and you will have to rebill down there and it will cost you sixteen dollars, I says I have got a sick horse and get me down there as soon as possible, and they got me down there at 12.30 to Fiss, Doer & Carroll's stables, unloaded me at 12.30 that day.

The COURT: With reference to that testimony the court holds it admissible only as tending to show he was exercising diligence on his part to forward his horses to the most convenient point in the shortest time, for that purpose only it is admitted.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Explain whether the charge of \$16.00 they made a reduction upon it?

Objected to by defendant.

Q. The purpose is to show it is no part of this \$29.90 which he charged this railroad as excess charges.

Objection overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

Q. Tell whether or not this \$16.00 was deducted from the bill or not?

A. It was.

36 Q. Do you know the amount paid for the shipment from Springfield to New York to these stables?

A. \$200.50.

Q. Mr. Kirby tell the jury the condition of those horses when loaded, and in what condition they arrived in New York later on at Fiss, Doer & Company's stables?

A. We loaded them here in as nice condition as I ever saw horses loaded in, I helped load other horses and I never saw horses in a nicer condition, there wasn't a sick horse in the train.

Q. What condition were they in when put on the train in Springfield?

A. Excellent condition as far as I could see, not a thing wrong with them.

Q. Go ahead, what condition were they in at Joliet?

A. The horses were in good condition at Joliet.

Q. What condition were they in when they left Joliet?

A. The horses appeared to be in good condition when they left Joliet.

Q. Tell the jury in what kind of a car they were loaded here and carried on to New York?

A. What is called a Burton Arms palace car, sixteen stalls, a stall for each, I had fourteen horses in it and two stalls vacant.

Q. How was the car arranged for feeding and watering the horses?

A. There is a trough in front of each four horses, each division that we feed in, a malleable iron trough that they feed in and we have water on the car underneath the car that we dip up and water the horses.

A. How much room was there in the car for the horses to move around in?

37 A. Where the horses stood four abreast there is about I should think two feet and a half for each horse, each partition, they are partitioned off.

Q. Partitioned are they?

A. Yes sir, all partitioned off.

Q. And four horses in a partition?

A. Yes, except the two middle tiers, there are only three horses in each one of them.

Q. How much room did they have?

A. It gave them a little more room for I set the partitions over and divided it up so we could just walk back and forth there, they probably had three foot, each one of them.

Q. What condition were those horses in when they reached Lake?

A. As far as I could see all right when they reached Lake.

Q. What examination did you make of them?

A. I simply fed them when it come time and watered them and saw they were all right.

Q. When did you notice, if you did notice anything wrong with any of them?

A. The first that I noticed of any consequence in the horses was when we — standing at Albany Sunday afternoon, my attention was called to Lou Blake who seemed to be quite sick.

Q. Do you know what seemed to be the character of her sickness or ailment?

A. She seemed to have caught cold it acted something like pneumonia or something of that sort.

Q. What was the condition of the other horses?

A. Some of them was pretty fair, and others were very tired,

especially my young one, the youngest, they got very tired so that they fell down and we had to get them up standing so long, and there was one or two others that were acting like they were quite sick, but nothing serious like Lou Blake.

38 Q. What was the condition of those horses at Schenectady Lou Blake and the other horses, what was Lou Blake's condition?

A. Now at that point I don't know that I could state.

Q. Well, what was her condition and the condition of those other horses when they reached 130th street?

A. Just as I told you, very tired and worn out, and this mare getting sicker and sicker all the time.

Q. What was the condition of the horses when they reached Fiss, Deor & Company's stables at 12.30?

A. Just the same as I have mentioned, very much worn out, tired out.

Q. What was the condition of Lou Blake?

A. Very sick, very sick.

Q. What did you do if anything for her?

A. I had a veterinary called immediately.

Q. What was his name,

A. I just forget his name McCoulough I think.

Q. The one that testified by deposition?

A. Yes sir.

Q. And how long did the horses stay at this stable?

A. I landed there at Monday noon, and we took them out of that stable at about seven o'clock led them out a mile a mile and a half, which took us about an hour, we got in at eight o'clock at the Garden, eight o'clock Tuesday night.

Q. Now in making your contract with the railroad company was anything said about the Madison Garden sale of any kind?

A. I never tried to ship a lot there that I didn't tell them I was shipping to Madison Garden sales.

Objected to by defendant. Objection sustained by the court.

39 Q. In your talk with Mr. Stuttsman?

A. Yes sir.

Q. What was said about that?

A. I said to him I want to ship the quickest way I can, this is a high bred load of horses, and I want to get there as soon as possible, it was a big sale, and I had to sell just when I catalogued to sell.

Q. Get there, did you say where?

A. Get to Madison Square Gardens.

Q. What arrangement had you made, if any, previous to that time, for the sale of these horses at Madison Square Garden, and how are arrangements made for sales of that kind?

A. We have to ship, I mean we have to get our pedigrees and a statement of each horse &c. in at a certain time, probably twenty days before the sale, in order that we shall be published.

Objected to by defendant, we had no knowledge, or the company had no knowledge of any such details as these, and it cannot be

charged by way of special damage or otherwise with details concerning which we had no information.

The COURT: Is it not sufficient to show that he had done that, that he had catalogued and had his horses for sale on a particular day?

Q. What arrangements had you made and were made about the sale of these horses at Madison Square Garden on that day?

A. I had made arrangements to sell these fourteen head of horses, also arranged for my dates to sell the horses at the Garden, not to sell later than Wednesday.

Q. Now what arrangement if any had you made as to when those horses were to be placed in the Garden?

A. None whatever, first come first served.
40 Q. What do you mean by that?

A. I mean if I had gotten there on time I would have been one of the first ones in the Garden, then I would have had my horses on exhibition all the time up to the sale.

Q. What effort did you make to get those horses in the Garden when you reached New York at 12.30?

A. I went immediately to the Garden and applied for stalls and they said everything was full and I would have to wait until they sold out a lot of them before you can get in.

Q. What was the earliest time you could get them into the Garden?

A. Sunday.

Q. No, after they reached New York on Monday when was the earliest time you could get them into the Garden?

A. Tuesday night at eight o'clock.

Q. What advantage if any was there in getting them into the Garden as early as possible?

Objected to by defendant on the ground that they are seeking to prove special damages here, and in order to prove special damages notice of all the factors which will bring about such special damage must be brought home to the railroad company prior to the shipment, and there is no proof nor can it be proven as I understand that anything was said to this railroad company about getting them there in time to exhibit to prospective purchasers, I think Mr. Kirby has testified that he did not, that he said they were to be sold on the 29th that is the only notice we had of any special circumstances governing this sale, and to go ahead and prove if he had gotten them there on a previous day he might have showed them to an admiring circle of horse men is not competent evidence in this case.

41 The COURT: Do you claim damage other than to the market price of the horses

Mr. SALZENSTEIN: By reason of such delay in transportation all of said horses were damaged, we merely say by reason of these things.

The COURT: You don't charge any special damages for not getting them into the Garden in time.

MR. PATTON: There is the further objection to that question, some advantage in getting them there in time to groom them up for a particular sale.

THE COURT: I am disposed for the present to take this view of the case under this declaration, and sustain this objection to treat this market as a market and let it be disclosed what time the stock got there, what condition they were in when they did get there, and let it be shown if it can be how much less they brought than if they had been in fair condition, simply treat this as the market, without attempting at this stage of the case at least to go into the question of what could be gained by having them there ahead of time and advertising them and all that kind of thing, treat this as you would the Union Stock Yards at St. Louis I am absolutely unable to make connection between the averments in this declaration and special damages for not getting them into the Madison Square Garden sale, I can easily see and am willing to proceed with the proof that they reached there in this damaged condition, and that they were put upon the market in the best condition you could put them in in the time they were had and were sold, and show the damages. It may go along on the theory I understand the declaration. The objection is sustained.

Q. Were those horses sold on the day they were advertised on this Wednesday?

A. Yes sir.

Q. What loss if any was there in the prices those horses
42 brought and would have brought had they been in proper
condition at that sale?

Objected to by defendant. Objection sustained by the court.

Q. Take the mare known as Lou Blake was she one of the horses in that shipment

A. Yes sir.

Q. She is the animal you have spoken of as being sick?

A. Yes sir.

Q. What was her condition at the time of the sale as to being sound?

A. Very sick and in the veterinary's care.

Q. How did she acquire that sickness?

A. On the train.

Q. In what way, explain that to the jury so they will understand it?

A. Well, when they are standing they are very uneasy, the ears standing they are very uneasy, they got to kicking and fighting, especially when they got tired, as soon as the car starts up there is a sort of draft that you can't keep out of the ear, that probably caused her to take cold.

Q. Being uneasy and rolling around and kicking what effect has that upon the heating of the body, if any?

A. They warm up just the same as if they were out trotting.

Q. This mare, had she been in condition, not tired or worn out or sick with cold as she was, what would be her fair market value at that time at that place?

Objected to by defendant, the witness has not qualified.

Q. Mr. Kirby, I think you stated you had a number of sales at New York of this sort?

A. Yes sir.

43 Q. How many sales did you attend at Madison Square Garden?

A. I think seven.

Q. When are those sales held?

A. They are held in November and the last of January and first of February.

Q. Of each year?

A. Of each year.

Q. How many sales are there in a year?

A. Two there.

Q. Have you attended any other sales?

A. Yes sir.

Q. Where?

A. At Chicago.

Q. What familiarity have you with the prices brought by horses at those sales?

A. Well, I certainly have a pretty good idea or I would not—

Q. Besides attending these sales and seeing the prices horses bring, have you any other means of knowing what prices horses bring at those sales?

A. Yes sir.

Q. What is that?

A. By selling them and seeing them sold.

Q. Well, is there any other opportunity besides that, do you see the Horse Journal?

Objected to by defendant as leading. Objection sustained by the court.

Q. Is there any other means of ascertaining when you do not attend personally the prices the horses bring?

A. I certainly look over the papers and see what horses sell for, and their breeding and everything of the sort, that is what posts me, the journals.

44 Q. What has been your habit in paying attention to those things for the last ten or fifteen or twenty years?

A. Well, it is certain breeding and feed and everything of that sort that goes to make up the price of the horse in addition to the formation.

Q. What have you done if anything towards posting yourself as to what horses bring at those sales where you have not been present in person?

A. Reading of sales that were made, and of the different horses that I knew.

Q. Are you familiar with the prices that horses of this kind bring at New York at these Madison Square Garden sales?

A. Yes sir.

Q. What in your opinion would this mare Lou Blake 2 have brought had she been in sound condition, not tired and worn out,

and not suffering with cold at that sale at Madison Square Garden held on that day January 26th 1906?

Objected to by defendant, simple familiarity with sales four and five months apart is not sufficient to show he had familiarity with conditions surrounding those sales, or market price or market values of animals of this class at this particular time, if he had been at a sale in November—When was the last sale Mr. Kirby that you were at in New York before this?

Mr. KIRBY: It was a year, it was two years before this sale.

Mr. PATTON: To make this man to qualify him as an expert on market values, or his being competent to testify on market values by authority of his attendance at sales two years before, without knowing what the conditions of that sale were would be it seems to me highly improper.

The COURT: The objection is overruled, he says he has kept posted on the market all the time through the papers and journals like anybody else does. I think it is competent, I think he comes over the line into the field of expert on these things, it is not 45 for me to say how much of an expert. To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: I desire to object again on the ground that the damages accruing out of a failure to realize a high price at such a sale are purely speculative.

The COURT: I think the form of the question is bad, I think the question would be, what was her fair market price in that market at that time.

Q. What would be the fair market value on that market at that time, if she had been in proper condition of Lou Blake 2 had she been in sound condition, not having the cold you have spoken of, and not worn out?

A. \$2500.00.

Objected to by defendant, and ask to have it excluded on the ground it appears from this gentleman's testimony he has no sufficient knowledge of the market, and that the answer is an answer as to purely speculative values, and not market values, in as much as the answer is predicated on a particular sale and particular conditions surrounding this sale, of which the defendant in this case had no notice or knowledge prior to the shipment.

The COURT: The objection is overruled, the court is of opinion that this witness has sufficiently qualified as to make it the duty of the court to receive him as an expert on market price, and that the other points raised by counsel are questions for the jury as to the weight of the evidence of the witness, and not questions of law for the court.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Now amongst the shipment I call your attention to a horse called Rhythmic Bell. I withdraw that question; what did this mare Lou Blake 2 bring at the sale at that time and place?

A. \$425.00.

Q. Now I call your attention to the horse called Rythmie Bell 2.

46 MR. PATTON: I don't like to interpose objections all the time but I want to keep the record, what she actually did bring, what this man actually sold her for is no criterion of what she was worth at that time, whether he has honestly and fairly lost on that account, he may have sold her collusively, there may have been other conditions than the condition of her health.

The Court: His statement of what she did bring is allowed to stand, but it must be supported by some evidence tending to show that she brought the fair market price in that market at that time, for her in her condition.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. What do you say as to whether or not she brought her fair market price in her then condition at that time and that place?

A. I think she did, for she was very sick.

Q. Tell the jury in what manner she was sold?

A. I sold her sick, just as she stood, I said she is in the veterinary's care, and there she is.

Q. How was she sold, tell the jury, explain to them the mode of selling at that market, how the market price was arrived at, what was done?

A. Just simply by moving her a little.

Q. Moving her where and *who*?

A. In the track they have in the Madison Square Garden.

Q. Tell the jury about those tracks and how horses are sold there?

A. The track is up above the horses, the horses beneath, whenever a horse is brought up he is brought up in front of the judges' stand, and an announcement made before they are sold or moved up, then you move them up to show whether they move or not, this mare was in such condition that we didn't move her scarcely any, we could not, I said there she is, she is sick, but I guarantee the horse, you have got to guarantee.

Q. What was done about outcry if anything who did the selling?

A. Fasig, Tipton & Company.

Q. Who did it, the man?

A. Their auctioneer, Mr. Bain.

Q. What did he say about this mare?

A. He says you hear the statement about this mare, you see how she is bred, the amount of stakes she has entered in.

Q. How she is bred?

A. Yes, sir.

Q. How would they see how she was bred?

A. From the catalog, there is the paper.

Objection by defendant to the reference to the catalog, and object to her breeding; here are large special damages claimed against this company for a failure to get certain animals at a certain market

at a certain time, and in good condition; as I understand the declaration in order that any damages special in their nature, owing to the individuality of the animal or owing to the environment, while they may be proven, it must be first shown that notice was given to the carrier of the special circumstances concerning both the individual and environment.

The COURT: I don't agree with you in that position for the purpose of testing whether an animal brought its worth or not at public sale it may be shown what virtues of the animal the auctioneer cried to the People, and it is not so material what they were as what they were represented to be and what they were understood to be, if he withheld any strong points you might say as you stated a moment ago she sold for \$425 by collusion, but if he proclaimed her strong points, and tend to show a fair sale, and that the price she brought was on account of her apparent condition of health rather than otherwise.

48 MR. PATRON: In order that I may be understood, my position is may it please the court, that when special damages are claimed against the carrier arising out of special circumstances of individuality of shipment, or out of a special reason why a shipment should get to a place at a certain time, the environment surrounding that sale, the carrier preceding that shipment, in order to be charged with this extra liability, must have notice of all these special circumstances, that is to say, if I have a threshing machine that is out of order, and it is necessary that I have a part for that threshing machine in order to carry on my business, and I deliver at Chicago to the railroad company that part without giving notice to the railroad company of the special reason why that part is necessary to be delivered to me in a represented time, or what that part is, the railroad company is justified in feeling it is just an ordinary threshing machine part, and no circumstances making it necessary that that ordinary threshing machine part should be delivered within a special time for a special purpose, and I say there is no proof here of any such notice to the initial carrier as will permit proof of these special circumstances for the purpose of raising special damages.

The COURT: That is what I assume you are driving at, but it has no application to the state of case now before us, the case is being tried on this proposition that *that* these horses were 49 shipped to New York to arrive there for market at a certain time, that they arrived there in such condition that they brought less money than they otherwise would have brought in that market, that is all there is to it, and it does not seem to me any question of law to limit the plaintiff, no question of law that requires me to rule how much the stuff was worth and how much it was damaged.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. What was that catalog you referred to?

Objected to by defendant.

The COURT: He may state what the auctioneer said.

To which ruling of the Court the defendant by its attorneys then and there excepted.

Q. What did the auctioneer state about the catalog?

Objection by defendant to what the auctioneer stated about the catalog.

Q. In the presence of these buyers?

The COURT: I am trying to hold if Albert could hear and *will* understand, I am trying to hold such things as were done there as tend to show whether the sale were done there as tend to show whether the sale was fair or unfair sale is competent evidence.

Mr. PATTON: We don't object to that, but we object to lugging the catalog in by the ear, that is what we object to.

A. The auctioneer is well versed in pedigrees, he says this is Lou Blake two year old, record 29 $\frac{1}{4}$ entered in \$40000 worth of stakes, and bid up, she is sold as she stands, she is sick, in 50 the veterinary's hands right here, do you want to move her up, I says yes move her up, and we moved her up a little and brought her back and sold her, sold her as sick, and stated her pedigree; if he is well versed in pedigrees he don't have to look at the catalog.

Q. How many bids were there?

A. I think probably two or three only.

Q. Now before we leave that tell the jury how many people were present at that sale?

A. Well I should judge twenty five hundred or three thousand people.

Q. Where is Madison Square Garden and how is it situated?

A. Well, I forget the street it is on, probably 26th street, and it occupies a block.

Q. How is it arranged for seating people who want to buy and see the horses, and how towards showing the horses?

A. It is arranged with seats like opera houses, to carry on shows of different sorts there, the track is made just inside of those seats, the seats from one round of the track, and a fence on the inside of that, about twenty five feet wide, and the horses are exercised around that track, it is of the shape of a regulation track with ridges at the sides thrown up on the turns.

Q. How are those seats built with reference to those at the fair grounds?

A. Built one above the other.

Q. Built in tiers all overlooking the track.

A. Yes sir.

Q. Now was there a colt in that shipment called Rythmic Bell 2?

A. Yes sir.

51 Q. What was his condition when he reached New York, and what was his condition attributable to?

A. He was sore and tied up, and it was caused by the long, tedious shipment.

Q. Was he put on sale at this market on this day?

A. Yes sir.

Q. What was his fair market value on that day and at that place in the condition that he was in?

A. Well, he could not show anything, he was all tied up, he could not step out a bit, all tied up and sore, and I was surprised at the price he did sell in his condition.

Q. What was that price?

A. \$1,000.

Q. How was that sale made?

A. Just the same as Lou Blake, only stated this is Rythmic Bell you see how he is bred, and you see the colt, apologized for the condition he was in by being tied up and sore on the train, we moved him as well as we could and sold him.

Q. What was the fair market value of that colt at that time and place had he been in good condition?

A. \$3000.

Q. In that consignment was there a mare called Cornelia Bell?

A. Yes sir.

Q. What was her age at that time?

A. I think she was eleven years old.

Q. What was her condition at the time she reached New York?

A. Similar to the others, this was a double gaited mare, and it had a great effect on her, when one of these are sore by a shipment they don't extend themselves and step out and trot, she was 52 a trotting mare. I remember she got a mark of 10 trotting, and it had a great effect on her, she was double gaited

Q. What would that mare have brought at that sale at that time had she been in sound and good condition?

The COURT: What would have been her fair market price on that market.

Q. What would have been the fair market price of that mare at that time and place had she been in good sound condition?

A. From her breeding, her record and her constant performance in the Grand Circuit that mare was worth \$3500.

Q. What was her fair market price at that time and place in the condition she was in?

A. Well, I think when they cannot show up the fair market price is what they sell for right there.

Q. Well, what was that?

A. \$2600.

Objection by defendant to the answer of the witness and ask that it be excluded, as the plaintiff states he bases it on the selling price and not on the market value.

The COURT: A portion of his answer is entirely irrelevant, if he would listen and answer we would have little trouble; I understood him to say her fair market value as she was then, was at that time and in that market, was \$2600. He said a whole lot more than that, but I understood him to say that, is that right or not?

A. Yes sir.

The COURT: That much of it may stand all the balance is stricken

out. To which ruling of the court the defendant by its counsel then and there excepted.

53 Q. In that consignment was there a horse by the name of Easter Bell?

A. Yes sir.

Q. What was his condition at the time he reached New York, the time he was shown at the sale?

A. Well, I would have to say simply worn out by the trip.

Q. What do you attribute that condition to?

A. The long tedious trip.

Q. What was the fair market value of that horse at that time and place had he been in good condition?

A. Was that Easter Bell?

Q. Yes?

A. I don't really know whether I can remember the exact amount of each horse.

Q. I am not asking you what he brought. I ask you what his fair market value at that time and place was, had he been in good condition?

A. Well, she was a high bred mare—

The COURT: Answer the question if you can.

Q. What in your opinion?

A. \$500.

Q. What was the fair market value of that horse at the time and place in the condition she was in at the time, what was the fair market value of this mare at the time and place and condition she was then in?

A. I would not exactly know how to answer that, except what she sold for. I would not know how to answer that except the price that she bought.

Q. What was that price?

A. I don't know as I just remember what that price was.

Q. If you made a memorandum at that time?

A. I did, yes sir, in the catalog, \$285.

54 Objected to by defendant on the ground that they are confined by their bill of particulars, and it is alleged in their bill of particulars she was worth \$325 market value.

The COURT: Well they are bound by their bill of particulars.

Mr. SALZENSTEIN: That is not a bill of particulars, it is a copy of the account sued on. I don't know as we are confined in a copy of account to the exact market value.

The COURT: You would not be allowed to claim a greater amount of damage on this animal than you claim in your bill of items.

Q. How was the sale conducted in the case of this mare?

A. Just the same as the others, led them, moved her.

Q. And how was the sale conducted in the case of the other mare?

A. Just moved her in front of the pony with the harness on.

Q. In this consignment was there an animal named Woodford Bell?

A. Yes sir.

Q. Was that a mare?

A. Yes sir.

Q. What was her condition at the time she reached New York and at the time she was sold at the Madison Square Garden sale?

A. Similar to the others.

Q. How was she sold?

A. Just the same as the others, in front of a pony.

Q. Now if this mare had been — good condition at that time and place what was her fair market value in your opinion?

A. My idea just the same price for them marks \$500 a piece.

Objected to by defendant, the bill of particulars for — states \$375.

The COURT: So long as the bill of particulars for him — the damages cannot be in excess of the bill of particulars, but prove whatever you can.

55 Q. What in your opinion was her fair market value at that time and place?

A. Well, I would not know how to answer that, only as I answered the other.

Q. Well, what did she bring?

A. That is the price she brought——

Q. What was it?

A. I don't know without looking at the catalog.

Q. If you made a memorandum at the time?

A. I did, right there, yes sir.

Q. What was it?

A. \$325.

Q. In that consignment was there an animal named Bell Wharton?

A. Yes sir.

Q. Was that a mare?

A. Yes sir.

Q. What was her condition at the time she reached New York and at the time she was shown at the sale?

A. I didn't notice any difference in her from the others, the same condition, tired.

Q. What was that condition due to?

A. The long, tedious shipment.

Q. What in your opinion was the fair market value of that mare at that time and place had she been in sound condition?

A. Well sir I would say \$500 anyway.

Objected to by defendant, the market value stated in the bill of particulars is \$265.

Q. How was she sold?

A. Just the same as the others, with the harness on in front of a pony, we moved her as much as we could.

Q. What did she bring?

A. She brought \$225.

56 Q. Was there an animal in that consignment by the name of Veronique?

A. Yes sir.

Q. What was that, a mare, horse or stallion?
A. A mare.

Q. What was her condition at the time she reached New York and at the time she was sold?

A. It didn't seem to affect her as much as it did the others, and shipped in a little better form.

Q. Was she affected in any way by that?
A. Well, somewhat sore.

Q. Did that have any effect on her market value?
A. O, yes, she could not show the speed she otherwise would.

Q. What in your opinion was her fair market value at that time and place had she not been in that condition, and sound and all right?

A. Well, I would fix her price at \$1,500.

Objected to by defendant on the ground the bill of particulars shows \$1,400.

Q. What did she sell for?
A. \$1,225.

Q. Was there a black filly by Cresius in that consignment?
A. Yes sir.

Q. What was the condition of that black filly at the time she reached New York and at the time she was sold?

A. It didn't affect her as much as it did some of the others.

Q. Did it affect her any?

A. She could not show the speed she did here at home, she seemed to be tied up.

Q. What do you mean by being tied up?

A. Well, sore all over, they don't extend themselves.

Q. Did that have any effect on her market value at that time and place?

57 A. Oh, yes, you have got to show any animal.

Q. What in your opinion would have been her fair market value if she had been free from this condition and in sound condition at that time and place?

A. Well, knowing this filly as I did I would put her price at \$800.

Q. What did she sell for?

A. She sold for \$700.

Objected to by defendant to the answer "knowing this filly as well as I did" showing very plainly the witness is not testifying to market value but from price of affection.

The COURT: Strike that out.

Q. I ask you about her then market value at that time and place.

The COURT: As people there would see her, not what you know about it.

A. I would say \$800.

Q. At that time and place had she been over this condition you have spoken of?

A. I say \$800.

Q. Now was there in that consignment a brown colt by Red Tell?

A. Yes sir.

Q. What was the condition of that colt at the time it reached New York and the time it was offered for sale at Madison Square Garden?

A. Well, his condition was not so bad as some of the others were in, he showed fairly well.

Q. Was there anything the matter with him produced by that trip?

A. Nothing only soreness from shipment.

58 Q. Did that have any effect on the market price at that time and place?

A. Yes, because it had an effect on his speed.

Q. What in your opinion was the fair market value of that colt at that time and place had he been free from that condition you have just spoken of?

A. Well, \$400.

Objected to by defendant on the ground the bill of particulars shows a market value of \$350.

Q. What did this colt sell for?

A. He sold for \$300.

Q. Was there in that shipment a bay filly by Red Toll?

A. Yes sir.

Q. What was the condition of that filly at the time it reached New York and the time of this sale?

A. Pretty fair condition.

Q. Did it suffer in any way by this long shipment?

A. Simply tied up by being somewhat sore.

Q. Did that affect its market value at that time and place?

A. O, yes.

Q. What in your opinion was the fair market value of that bay filly at that time and place had it been in sound condition?

A. \$250.

Objected to by defendant on the ground that the bill of particulars contains here a value of \$230.

Q. What did she sell for at that time and place?

A. \$200.

Q. In that consignment was there a brown colt by Trugantic?

A. Yes sir.

Q. What was his condition at the time he reached New York and the time of the sale?

A. He was very tired, and fell down a number of times before we got to New York and we had to get him up and it affected him very badly.

59 Q. What was that condition due to?

A. To the long tedious trip.

Q. What in your opinion was the fair market value of that colt at that time and place had he been in good condition?

A. \$300.

Objected to by defendant, the bill of particulars shows he was valued at \$285.

Q. What did that colt sell for at that time and place?

A. \$160.

Q. Was there a brown filly by Trugantic in that same shipment?

A. Yes sir.

Q. What was her condition?

A. She was another one tired and sore, she got down and we had to get her up several times.

Q. What did you ascribe her condition to?

A. To the long ship, it tired her out.

Q. What was the age of this filly and the other?

A. They were yearlings past, coming yearlings in January.

Q. What was the value of this filly at that time and place if she had been in good condition?

A. The same as the other one \$200.

Objected to by defendant, the bill of particulars shows her market value to have been \$115.

Q. What did that filly sell for at that time and place?

A. She sold for \$100.

Q. Now was there an animal by the name of Red Star in that consignment?

A. Yes sir.

Q. What was his condition at that time and place?

A. Well, the shipment affected him, he was tied up and could not show his speed either.

60 Q. Did that have any effect on his market value at that time and place?

A. Yes sir, it did.

Q. What in your opinion was the fair market value of this horse at that time and place had he been free from that condition?

A. \$300.

Objected to by defendant, it is shown by the bill of particulars that he was of the market value of \$250.

Q. Well, we will amend the bill of particulars.

Mr. PATTON: We object to the amendment of the bill of particulars at this time; this statement was handed to us at my request, and on my statement to Mr. Salzenstein that if he would give me a statement I would not apply for a bill of particulars, in order that I might ascertain by inquiry what was the value of these animals in New York if necessary; now these various animals are stated to be in this paper of values that I have stated in the objections; now to come in this morning and tell us the statement I gave you six or eight months ago was not true, or the statement I gave you to work on in order to find out what were the values of these horses,

is very unfair, and it would seem to me that no amendment should be allowed at this time.

The COURT: My attention was not called to that one way or the other, of course if you are taken by surprise, the same rule of amendment applies to a bill of particulars as to any other pleading, of course if the adverse party is taken by surprise, a change of basis always furnishes a basis for appeal to the court for a continuance and all such.

Mr. PATTON: I don't want a continuance, I want to go ahead since we have got started.

The COURT: I don't think it is very material.

Q. What did this Red Star bring at that sale at that time and place.

A. \$220.

Q. Was there an animal in that shipment by the name of Bertha Craven?

61 A. Yes sir.

Q. What was her condition at the time she got to New York and that sale?

A. Very much tied up and sore from the long ship.

Q. What did you attribute that condition to?

A. To the long shipment.

Q. What in your opinion was the fair market value of that animal at that time and place had she been in proper condition?

A. \$300.

Mr. PATTON: I would like to know if you amend the bill of particulars in that regard the difference is \$290.

Mr. SALZENSTEIN: \$290 we have not changed.

Mr. PATTON: Then I object.

Q. What did she sell for at that time and place?

A. \$250.

Mr. PATTON: I think we may be able to save a little time by asking one or two questions with regard to this bill of particulars.

The COURT: You can cross examine as far as you wish to before we adjourn.

Mr. PATTON: I would like to get this information so I may act upon it if necessary; Mr. Kirby you were prior to the bringing of this suit in consultation with Mr. Salzenstein about these horses?

A. Yes sir.

Q. You had many conversations with him?

A. Yes sir.

Q. You remember the time do you that he was called upon by me to furnish me an itemized list of the values and selling prices of the horses?

A. I think I remember the time yes sir.

62 Q. You remember having a consultation with him in regard to that thing, to furnish me such a list?

A. I think he asked me the questions about it, yes.

Q. How did it come that the prices of these horses to which I have called the attention of the reporter as we went along are different and higher from the prices as stated to me in that statement, how does it come those horses in your judgment have grown greater in market value since the beginning of this suit?

A. You say why we did that?

A. Yes.

A. I don't know. I didn't know about those prices there.

Q. Wasn't that statement prepared by you and Mr. Salzenstein together?

A. I never saw that statement in my life.

Q. Didn't you talk to Mr. Salzenstein?

A. I talked to Mr. Salzenstein about the suit.

Q. About the market values of these various houses, didn't you give them to him as your judgment to make up these statement of items?

A. I showed him the catalog of what they sold for.

Q. Did you give him your opinion as to what the market value was in healthy, sound condition?

A. I don't remember of it.

Q. Do you know as plaintiff in the case from whom or where Mr. Salzenstein got the information to furnish to me the list of market values which was furnished to me?

A. No sir, he got part of it probably from me.

Q. Do you remember to have seen that itemized statement before?

A. No sir but I think he talked to me about this statement but I don't remember seeing it before.

63 Q. Did you give him the market values as they are set down as being the market values of those horses in healthy condition?

A. I don't remember that I did sir at all, I won't say that I did not, but I don't remember that I did.

Q. You do note from the changes in the bill of particulars the changes from the original typewriter and in ink that the market values in healthy condition, that a large number of those horses have been changed to a considerably higher value than originally, you notice that don't you?

A. I see they are, yes sir.

Mr. SALZENSTEIN: One question in this connection; do you remember how this statement of market value came to be made, whether it arose out of a joint conversation where you said that the difference would be a certain percentage without asking you particularly to each one of them?

A. Yes sir I remember that.

Mr. PATTON: What was the percentage that you gave of the difference?

A. Fifteen percent I think.

Q. Fifteen percent on all the horses?

A. Aside from Lou Blake and Rythmic Bell.

Q. And that would be fifteen percent higher than the prices that actually were brought?

A. Yes sir.

Q. And that is all you mean to say now, that the horses were damaged to the extent of fifteen percent in their sale except Lou Blake, that is what you mean to say now what you told Mr. Salzenstein then, and is that all you mean to say now that if they had arrived in a healthy sound condition they would have brought fifteen percent more than they actually brought, with 64 the exception of Lou Blake, is that what you mean to say now?

A. Mean to say?

Q. Do you mean to say that now?

A. I am satisfied they would have brought fifteen percent more yes sir.

Q. And that is what you told Mr. Salzenstein then?

A. I don't know whether I did or not, that was the least anyhow.

Q. But fifteen percent is the percentage that you say now; that is all.

Mr. SALZENSTEIN: Did you in the statement made to me state to me the market value of each specific horse?

A. I did not.

Q. What do you say as to your statement about it, when you were asked specifically as to the market value of each horse at that time and place, whether fifteen percent is the correct basis or your answers made in response to questions?

A. My answers in response to questions.

Mr. PATTON: Let me see, take Easter Bell, how much do you say now was her fair market value in that market had she arrived there in sound condition?

A. \$500.

Q. What did she actually bring?

A. I think \$285.

Q. Then do you mean to say when you told me fifteen percent that you were wrong about that there is considerable more difference between \$285 and \$500 than fifteen percent isn't there?

A. Fifteen percent, there was a damage of at least fifteen percent and more.

Q. You are now saying it is more are you?

A. Yes sir.

65 Mr. SALZENSTEIN:

Q. Mr. Kirby, will you explain to the jury what was done in and about moving this car in which those horses were at the places at which this through train stopped the length of time that you think it did?

A. Well sir, at a number of places between Lake and New York they iced up the meat cars that were on this train, and in icing up cars they move up a car length and stop at the chute and ice that

car, and move up a car length and ice another and so on through until the train is iced up, and they pull out in all probability—

Q. How many cars were there in the train that were being iced approximately?

A. O, it seemed to me twenty or thirty cars probably.

Q. What effect does that method of handling a train have on horses?

A. Very bad.

Q. In what way?

A. Jerking them off their feet, jamming backwards and forwards making them restless.

Q. What do you know about the running time of this other train called the horse special which leaves Lake and reaches New York?

A. I never was on that train I only know—

A. I simply ask you what you know about the running time, what time it was due to leave Lake and reach New York?

A. It was due to leave Lake sometime after three o'clock they told me it left Chicago at three o'clock and I would be picked up at Lake, and due in New York sometime Saturday night.

Q. When you speak of three o'clock you mean three o'clock on that Thursday the 25th of January in the afternoon.

66 A. Yes sir.

Q. Now these horses that you have named and told the sale prices of and their market value are the horses that were named in this bill of particulars or copy of account Mr. Patton referred to?

A. Yes sir, I looked it over and they are the same horses.

Q. I simply wanted to identify it.

The COURT: I suppose that is enough.

Witness on cross examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows to-wit:

Q. How long have you been in the horse business Mr. Kirby?

A. Well sir, I have been in the horse business all my life as far as that is concerned.

Q. How long have you been connected with the horse business in such way that it required the shipping of horses on railroads?

A. Well, since 1875 about.

Q. During that time approximately without trying to get you to say the exact number, about how many shipments of horses have you made on various railroads?

A. I could not get at that accurately.

Q. It would run up into the hundreds wouldn't it?

A. Yes sir, no, not into the hundreds, not with horses, but all the shipping I have done of course it would run up into the hundreds.

Q. I mean shipment of horses?

A. Yes sir.

Q. It would be over a hundred shipments?

A. Of horses?

Q. Yes?

A. No sir.

67 Q. In taking your horses, when driving horses around the circuit, taking them from point to point you would ship them by freight, would you not?

A. Yes sir.

Q. During this period of nearly thirty years you have been driving horses around the circuit?

A. Yes sir.

Q. Making short jumps from town to town where there were races?

A. Yes sir.

Q. At each jump you would have to make a shipment?

A. Yes sir.

Q. Would not you say you made a hundred or more shipments?

A. I understood you to — sales, O yes, I will say over a hundred.

Q. Considerably over a hundred.

A. Yes sir.

Q. How many shipments to New York State have you made?

A. Well, I won't say positively, from five to seven loads I have shipped there.

Q. How many shipments since 1889?

A. I could not remember dates well enough to tell you right now.

Q. Well, 1899 is nineteen years ago, how many shipments in nineteen years?

A. Well, as I say from five to seven shipments.

Q. In that period?

A. Yes sir.

Q. Have all those shipments been of what you call high class horses?

A. Yes sir.

Q. Over what railroads have you made those shipments?

A. I have made them over the Wabash and over the C. & A.

Q. One over the C. & A. and the balance over the Wabash?

A. Yes sir.

68 Q. Now in making these shipments it was necessary I presume or convenient or proper for you to ascertain what the rate was going to be on each shipment?

A. Yes sir.

Q. And on each shipment you would have some conversation with the agent, and then when the time came for shipping you would be handed a contract to sign?

A. Yes sir.

Q. That occurred on each shipment that you made?

A. Yes sir.

Q. And the mode adopted at the time of this shipment that is in controversy now was the same as the mode adopted on the former shipments?

A. Yes sir.

Q. And on the former shipments when you signed this contract a copy would be taken by you and a copy by the railroad company?

A. I suppose so, yes I had one.

Q. You had in your possession during this period of time from five to seven of these contracts of shipments?

A. Yes sir.

Q. These contracts have been made on a printed blank, what is called the Uniform Live Stock Blank is it not?

A. I judge so, yes, it looked to me so.

Q. And on each of those contracts was a notice in large letters to the shipper to read this contract?

A. I never read one in that way in my life.

Q. No, but that notice was there to the shipper to read the contract was it not?

A. I don't know sir, may I state—

Objection by plaintiff as not cross-examination.

The COURT: It don't make very much difference what the order is for the written contract, it might be presented to him and identified and later on be offered, of course, *prima facie* as soon as identified it would be received, probably it would be the best way to preserve all this until they introduce this witness in rebuttal.

Mr. PATTON: They have already gone into that matter by asking him if he knew what was in this contract, and he answered he didn't know.

The COURT: Then it would be just as well, if he stated in chief he did sign such a contract.

Mr. SALZENSTEIN: He said he signed the contract showed him by the agent, and the agent told him to sign here and sign here, what was in it he didn't know.

The COURT: And he said he did sign such statement, I think it is just as well to let him be cross-examined now.

Mr. GRAHAM: As I understood Mr. Salzenstein his objection went rather to other contracts he signed in shipping over other roads at other times.

The COURT: That objection would not be well taken, the extent to which a shipper is familiar with the method of transacting business in all cases I have tried the fact is always allowed to go along tending to show whether he exercise such diligence as a man should under the circumstances, as tending to test his truthfulness, usually examine as to habits, custom and all such things.

Q. Let me have that paper Mr. Kirby?

A. Which paper?

Q. The paper you signed at the C. & A. Railroad office of the company for the stock before it was shipped. (Witness hands over a paper.) I show you this paper being marked at the top "Form

70 85.10M 5-05" which I ask the reporter to mark Ex. "A" and show you the signature "N. T. Kirby" at the bottom of that paper, is that your signature?

A. Yes sir.

Q. Signed by you?

A. Yes sir.

Q. I show you a signature on the back of that paper under the word in heavy letters "Release" N. T. Kirby, is that your signature?

A. That is my signature, yes sir.

Q. Both signatures are your signatures signed by you at the depot of the Chicago & Alton Railroad Company freight depot, before you started on your journey?

A. That is right sir.

Q. Now that contract is to all appearances the same form of contract as the contract that you signed on the various occasions you shipped over the Wabash road is it not?

A. Perhaps it is, I never read one over, I never looked one over in my life, I just signed them, and I know I signed them in two places if I have a pass.

Q. And you have noticed on the other contracts and this contract printed across them in red letters, "Read this contract"?

A. I don't know whether I have or not I could not if I never read one of them over in my life.

Q. You will not say you did not notice on this contract printed in large red letters across the face of this contract, "Read this contract"?

A. Yes, for I didn't see the contract open. It was just pushed through the grate and he said sign here, and turned it over and said sign here.

Q. You knew when signing this contract by experience on former occasions that you were signing a contract for the shipment of this stock didn't you?

71 A. Yes, the same as other shipments.

Q. You have had experience five or six times shipping to New York on contracts which to all intents and purposes as far as you are able to recognize were similar contracts to this and you signed it as a contract?

A. Yes sir.

Q. Now with reference to these conversations with Mr. Stuttsman, Mr. Stuttsman is what is called Live Stock Agent is he not?

A. He is represented to me to be that, yes sir.

Q. And he got into communication with you as far as you know through Mr. Connor the passenger agent?

A. Yes sir.

Q. Where did you say you first saw him, did he come around to your shop?

A. Mr. Stuttsman?

Q. Yes.

A. Yes sir.

Q. And how long was that before the date of this shipment?

A. Probably ten days before.

Q. In that conversation you told him you wanted to deal with him and not with Mr. Eggleson I believe?

A. Yes sir.

Q. You knew that Mr. Eggleson was the freight agent in charge of the freight business here in Springfield?

A. I knew he was the agent here, yes sir.

Q. The reason you didn't want to deal with him was you had been unable to get accommodations from him?

A. Yes sir.

Q. You told Mr. Stuttsman what? Just tell us what you told him on that occasion, the first occasion.

72 A. He introduced himself as the Stock Agent, he said Mr. Connors had spoken to him about it, and I stated to him why I would ship with him and so on, because I wanted to get on the horse special, that I had a high bred, high priced lot of horses.

Q. Did you tell him anything on that occasion how you had learned about the existence of the horse special, how you had learned?

A. In a way, yes.

Q. Well, in what way?

A. By a party that shipped over the road.

Q. Mr. Thomas that was, was it not?

A. Yes sir.

Q. You told him that Mr. Thomas had informed you about this fast horse special?

A. Yes sir.

Q. And on that occasion he told you he did not know anything about that, that he would have to make some inquiries didn't he?

A. He said to me I will ship you to Chicago and put you on the Michigan Central at Chicago, I says I don't want to go to Chicago, I don't want to be bumped around switching at Chicago.

Q. That is the Chicago Stock Yards?

A. Yes sir.

Q. You understood that this fast horse special that Mr. Thomas had spoken to you about started from the Stock Yards?

A. I don't know where it started from.

Q. You understood in order to get on that by way of Chicago that your shipment would have to go through the Stock Yards?

A. Well I didn't know where it would go to get on the Michigan Central, I didn't know what arrangements they had, I wanted to connect there and wanted to avoid going into Chicago and being bumped around there.

73 Q. The prime object of your endeavors was to get your horses put on the through freight train?

A. Onto this fast horse train.

Q. On the fast train is what you wanted?

A. Onto the fast horse train, because I understand it didn't carry anything but horses and was a fast horse train.

Q. And you were objecting strenuously to having your horses put on any train in the nature of a local freight train, or any train making frequent stops and frequent switching on account of the effect on the horses?

A. Yes sir.

Q. What was the main object in making that arrangement?

A. The main object to get to destination as soon as possible.

Q. And to avoid the intermediate switching and bumping around

and stopping of trains and waiting at stations and all that sort of thing?

A. Yes sir.

Q. On account of the detriment to your horses by reason of their high breeding and nervous disposition?

A. Yes sir.

Q. Now Mr. Stuttsman on that occasion informed you that he would have to make some inquiries didn't he about that connection?

A. I don't just remember whether he stated there just the route he would take me, but he says I will ship you to Joliet.

Q. Who was the first one that mentioned anything about Joliet?

A. Myself.

Q. You objected strenuously going by way of Chicago and said you would not go by way of Chicago?

A. I didn't say I would not but that is the route I wanted to go by Joliet and the cut off.

Q. You informed him that is the way you wanted these horses routed was by way of Joliet?

74 A. Yes sir.

Q. You told him that you knew that was the way to go because Thomas who was a large shipper informed you that is the way he shipped his horses?

A. Yes sir.

Q. And you in that entire conversation were referring Stuttsman to the information you had secured from Mr. Thomas?

A. Yes sir.

Q. And were directing him to procure this shipment by way of Joliet?

A. I would go by the way of Joliet if I went to Chicago that is the route I wanted to take.

Q. But you did not want to go to Chicago?

A. No sir.

Q. That is what you were saying to him, that your information from Mr. Thomas led you to believe that the best way to go was by Joliet, and then make connection at Joliet and Lake to catch the fast horse train at Lake?

A. Mr. Thomas didn't say anything about Lake.

Q. Well, the cut-off as you call it?

A. The cut-off, yes sir, that is right.

Q. And it was by your direction that the Chicago part of it was cut out?

A. Yes sir.

Q. You would not stand for that?

A. I didn't want to ship by Chicago.

Q. Now at that conversation there was no definite arrangement made was there?

A. No sir.

Q. No rates quoted?

A. No sir.

Q. Just a preliminary conversation?

A. Yes sir.

75 Q. In which Mr. Stuttsman said he would make inquiries or something of that kind?

A. Yes sir.

Q. There was a later conversation when Mr. Stuttsman told you he had been to Lincoln to see a Mr. Donald or McDonald was there not?

A. I never heard of any trip to Lincoln from him I don't know anything about it.

Q. Didn't Stuttsman tell you that he had been inquiring of a gentleman who had made frequent shipments to New York by the fast horse train, and that he had learned some of the details of that matter from him in a subsequent conversation?

A. No sir.

Q. You did have a subsequent conversation however with Stuttsman?

A. Yes sir.

Q. You still insisted in that conversation you should go by way of Joliet and the cutoff?

A. No sir, I will state the conversation if you wish.

Q. Isn't it true in every conversation you still insisted you would not let the horses go by way of Chicago?

A. In the first conversation, all through the first conversation, after the first conversation nothing was said about going to Chicago.

Q. It was definitely settled in the first conversation you should not go by way of Chicago?

A. I didn't say I would not do it but I didn't want to go by way of Chicago.

Q. And the result of that conversation was that your shipping directions were for the going by way of Joliet and the cut-off?

A. Yes sir.

76 Q. Your purpose in that was to prevent the horses being jammed around on local freight trains and trains that stopped frequently at various points along the lines?

A. Going to Chicago?

A. No; on the whole journey?

A. O, yes, I wanted to get the fast train that would take me through, he said nearly on passenger time.

Q. And the information on which you acted in requiring this particular route was the information you had acquired from Mr. Thomas?

A. About shipping by way of the cut off, was, and the shortness of the time going to New York.

Q. When was it that you first learned of the proposed amount of money that was to be paid for the shipment to New York?

A. You mean the first rates I got of any road?

Q. O no, from this road?

A. Now then in the first conversation that I had with Mr. Stuttsman he took me over to the office and said to Mr. Eggleston fix this man out, and order him a car, I said no, don't order a car give me a rate first, I had the rates of the other roads.

Q. What was the rate on the other roads?

A. \$170.60.

Q. How many roads had you inquired of with regard to that rate?

A. I inquired of the Wabash first, in particular, and of the Illinois Central later on, a few days later.

Q. And was the rate given you by the Illinois Central and the Wabash conditioned on catching any particular train or anything of the kind or any particular movement?

A. Nothing only they would put me on the Michigan Central at a different point on the main line, at some other different point, and the rates were all the same.

Q. Were those other rates with reference to the fast horse train, the Michigan Central fast horse train?

A. Shipment to New York.

77 Q. No, no, you understand I think, were the rates given you by the Wabash and the Illinois Central conditioned on the shipment being taken on this Michigan Central fast horse special?

A. I never asked them anything about that, it was shipment to New York.

Q. You never suggested anything about that to them?

A. About the fast horse train?

Q. Yes?

A. No sir, not with the Wabash.

Q. Or the Illinois Central?

Objected to by plaintiff as not cross-examination.

Mr. PATTON: He stated in his original examination he had inquired of these various roads and got the same rates he got on the Alton.

Mr. SALZENSTEIN: I don't remember that, but if he did it is immaterial, the question is what was the contract with these people, and what did they agree to do.

The COURT: The ultimate question to prove is what was the contract with this defendant, and in testifying in chief he states he had seen these other two roads, had gotten a rate from them, and he told this man what rate these other people had given him.

Mr. PATTON: What he said was, I said to Mr. Stuttsman I have a rate from the other two roads, the Wabash and the Illinois Central, you get me a rate, and he said all right and I went out of the house, that is what he said on direct examination that opens up the entire field.

Mr. SALZENSTEIN: I don't see how it would be cross-examination to find out what the other rates were and what the details were.

The COURT: If it could be assumed that the defendant would not deny what he testified to with reference to that it would be wholly immaterial, but in order that the jury may have the whole thing and find out what the truth is I think it is safer to let the 78 whole thing go in.

Mr. SALZENSTEIN: What Mr. Patton is now asking about are the details, whether he was to connect with the Michigan Central

and the fast horse train or not. I suppose the purpose from Mr. Patton's opening statement he desires to inject into this case something relating to the interstate rate, that here is a contract outside of that, if it was to amount to anything it would be a matter of defense, the defendant could not raise it on cross examination in any way shape or form that I could see.

The COURT: I am inclined to think the wiser course is to let him answer the question.

Q. What was said if anything was said between you and the Illinois Central people in inquiring about this New York rate, about the fast horse special, was anything said between you and the Illinois Central people?

A. No sir.

Q. The only people you mentioned the fast horse special to were the Chicago & Alton people?

A. Yes sir, that is right.

Q. The rate quoted by the Chicago & Alton people to you was the same rate as that quoted by the Illinois Central and the Wabash which was \$170.60?

A. Yes sir.

Q. And according to your ideas, your notion, the Chicago and Alton quotation included an agreement that the horses should be so shipped as that they would catch the fast horse special and go to New York on the fast horse special?

A. That is the reason I shipped that way.

Q. And your understanding was that the rate of \$170.60 included that agreement?

79 A. That was the rate of all the roads, was three all alike.

Q. Your understanding was that the rate of \$170.60 included that agreement?

A. Well, I don't know as I just understand that question.

Q. I will put it in another way, you say the reason you shipped on the Alton was that you were to have this, what you call a guarantee to catch the fast horse special out of Chicago on January 25th?

A. Yes sir.

Q. Now when you made what you say was your contract it was with Stuttsman?

A. Yes sir.

Q. That contract was conditioned and dependent upon the catching of the fast horse special out of Chicago on January 25th?

A. Yes sir, that is what I took it.

Q. And the rate quoted to you for that agreement as you say was the same rate quoted to you by the Illinois Central and the Wabash?

A. Yes sir.

Q. How long prior to the time of this shipment had you talked with Mr. Thomas in regard to the routing of horses through Joliet and the cut off and also on the fast horse special?

A. At the Fasig-Tipton sale the year before.

Q. You then learned that he had shipped his horses that way?

A. Yes sir.

Q. And you wanted to duplicate what he did?

A. Yes sir.

Q. And so you had instructed Mr. Stuttsman, informed him?

A. I told him I wanted to ship that way.

Q. And the reason you told him you wanted to ship that way, that Thomas had told you that was the best way to ship?

A. Yes sir.

80 Q. You told him Thomas was a big horse shipper and knew about those things?

A. Yes sir.

Q. And you relied on the information you got from Mr. Thomas in that regard?

A. I wanted to get on the horse special.

Q. And you relied on the information you got from Mr. Thomas in that regard?

A. On the information I got from him and Mr. Stuttsman.

Q. Well, at the time you had this first conversation with Mr. Stuttsman, Mr. Stuttsman had not said anything about the fast horse special had he?

A. I don't understand, the question again?

Q. I say in the first conversation you had with Mr. Stuttsman nothing was said by him about any Joliet connection?

A. No, but in the same conversation there was by me.

Q. And it was in that same conversation you gave him this information about Mr. Thomas?

A. Yes sir.

Q. And in that conversation you were relying on the information that you got from Mr. Thomas?

A. Yes, I learned that was a quick route.

Q. From Mr. Thomas.

A. Yes sir.

Q. Now Mr. Kirby, from what I know of you you are a man who keeps abreast of the newspaper information of a certain kind?

A. To a certain extent.

Q. You know that since 1889 or thereabouts that it has been the law that a railroad shall have on file in its office the tariffs for the inspection of all shippers who want to look at them you know that?

81 A. No sir, I never read one.

Q. Not what you have read, but you know that was the thing that a railroad had to do, that it had to have the tariff and rates on file in its office for the inspection of people who proposed to ship over the railroad?

A. Well, I didn't know that they had to be there, but they might have been, I don't know anything about it, I didn't know that they had to be there or that they were there.

Q. You have seen from time to time in various railroad depots to which you had to go in these shipments, noticed the schedules and tariffs were on file haven't you?

A. I have of passenger trains, such as that.

Q. And freight trains at freight depots?

A. I never read it, never read either one, I noticed some railroad notice or something of that sort, and just passed it up as I would anything else almost on the wall.

Q. Passed it up, but I say you have noticed from time to time in the freight depots the notice of the company that the tariffs were on file for the shippers' inspection if they saw fit to use them?

A. I don't know but I have and I don't know whether I have or not.

Q. Now you say you didn't know anything about what was in this contract that you signed?

A. I never saw that until you handed it to me yesterday or the day before.

Q. Never saw it?

A. No sir.

Q. Where has it been all that time?

A. I don't know.

Q. Where was this contract at the time you signed it?
82 A. Excuse me, I thought you meant the other statement about price.

Q. I mean this contract you signed at the depot?

A. Oh, yes.

Q. After you signed it where did it go, who took it?

A. I did.

Q. What did you do with it?

A. I put it in my pocket.

Q. You say you didn't read it?

A. No sir, and I never read one of them in my life either.

Q. What did you suppose you were asked to sign that contract for?

A. Simply as a receipt that they had received the horses and would take them to destination according to agreement.

Q. What did you conceive was the necessity of your signing a receipt to the railroad company when it was the railroad company receiving the horses?

A. Because I was compelled to or they would not take the horses.

Q. You knew you were compelled to sign the contract or they would not take them at the rate made to you?

A. I didn't say anything about the rate, but they would not take them unless I signed the contract.

Q. But is it a matter of fact you knew you could not get a low rate on horses without signing a contract?

A. I could not get any rate, I could get a rate but I could not get them shipped out without signing a contract.

Q. Didn't you know that you could not get them shipped at a reduced rate of freight without signing a contract?

A. I never asked for a reduced rate.

Q. Isn't that what you were doing when you traveled around amongst the railroads to get the lowest rate?

A. I got a rate, I always get that before I start.

Q. The reason you go to various railroads is to see where you can get the lowest rate, is that it?

83 A. No sir, that ain't it.

Q. What did you go to the different railroads for?

A. What did I go to the Chicago & Alton for?

Q. No, why did you inquire around among the different railroads for if not for learning the lowest rate?

A. I don't know how the rates change from the year before or two years before, and I just wanted to know the rates.

Q. Why did you go to three different railroads in order to ascertain that thing?

A. The first was to see how I would ship the horses and I simply asked the rate.

Q. As a matter of fact you were wanting to ship your horses in the most economical way weren't you?

A. I didn't want to pay two prices.

Q. In other words you were bargain hunting, hunting for the place you could get the service done that you wanted at the lowest rates?

A. Just simply a matter of business.

Q. (Question read to witness.) Isn't that so?

A. I don't understand it in that way, that I was bargain hunting.

Q. Would you understand it in the way put in the latter part of the question, you were going around trying to find where you could get the lowest rates on these horses?

A. I simply ascertained the rates.

Q. Why?

A. To see how it compared with the years before, I always ask that.

Q. Why were you ascertaining the rates from three railroads if you were not ascertaining it for the purpose of finding out how the rates of the various roads compared with each other, isn't that true?

84 A. Because each road was soliciting the horses, the road that give me advantages, and I asked the rates and so on.

Q. The roads didn't know anything about the horses until you told somebody connected with them you had horses to ship did they?

A. That is right, I commenced in time, probably a week or ten days ahead.

Q. There were three roads competing for the shipment?

A. Asking for the shipment, yes sir.

Q. And you were inquiring rates from the three different roads?

A. Just simply asked the rates because I was in the habit.

A. Of inquiring rates?

A. Yes sir.

Q. And your object in so doing was to secure the lowest rate and best accommodation was it not?

A. No sir, I would ship over the road that gave me the best service.

Q. Irrespective of the rate?

A. Yes sir.

Q. You know Mr. Kirby, don't you, that rates on merchandise, stock, things of that kind, are proportioned to the value of the ship?

A. I suppose so.

Q. You cannot ship fast, high bred, nervous disposition, high bred racing and pacing stock for the same amount you can ship a carload of mountain ponies?

A. Carload rates, all freight.

Q. The higher the price of the horses the higher the rate, you know that don't you?

A. I know it is just a certain rate on a freight train from here to New York by the different roads as they stated to me.

85 Q. On horses of that class?

A. I have never paid any different.

Q. Did you ever ship any cheap horses?

A. No sir, but I had some not as good as others in the car.

Q. But what I am asking is don't you know as a matter of fact that the rate on horses or on merchandise of any kind grows higher as the value of the shipment grows higher.

Mr. SALZENSTEIN: The carload rate?

Mr. PATTON: Yes.

Mr. SALZENSTEIN: Put it in the question.

Mr. PATTON: You may ask him if you want to, I will put it my way.

(Question read to witness as asked.)

Objected to by plaintiff unless it is put in carload rates, the witness ought to understand what is in the mind of the examiner, the question should have some relevancy to the issue before the jury.

The COURT: You can bear that in mind, and if he don't put it in carload rates you will have a chance. The objection is overruled.

Q. (Question read to witness.)

A. On horses it does not where you ship by carload rates.

Q. How do you know?

A. I know from getting the rates from different roads.

Q. You never shipped anything but higher priced horses?

A. Not to this sale but other sales I have.

Q. Now you arrived in Joliet about six o'clock.

A. Yes, I looked at my watch and it was just six o'clock.

Q. What part of Joliet was that, was that in the Chicago and Alton yards or in the Central yards or do you know?

A. No sir I don't know, I know it was about the center of Joliet and within probably three blocks of the Michigan Central 86 depot, I don't know what switch we was on.

Q. At that point where you arrived at six o'clock was your car cut off the train which brought it from Springfield?

A. It was.

Q. And was left on the siding there?

A. Yes sir.

Q. And that was the same siding from which the car was subsequently taken by the Michigan Central train?

A. It was picked up by an engine from the Michigan Central

and placed over to their stock yards probably five or six blocks further later on.

Q. How much later on?

A. About noon that day, just about noon the 25th.

Q. What time did you leave Springfield?

A. About eight o'clock that night.

Q. At night?

A. Yes sir.

Q. You got into Joliet at six o'clock the next morning?

A. Yes sir.

Q. That is your car got to the point where it was subsequently picked up by the Michigan Central Freight engine at about six o'clock?

A. Yes sir.

Q. And that is the point that your troubles began?

A. Yes sir, I suppose so.

Q. How about the value of these horses they were fancy horses?

A. Yes sir.

Q. Had fancy values?

A. Yes sir.

Q. And the values you have put on them are based on the fact that they were fancy horses?

A. Yes sir.

87 Q. And appeal to you because you are a lover and driver and owner of fancy horses?

A. Yes sir.

Mr. SALZENSTEIN: What do you understand by the term fancy horses as used just now?

A. They are pedigreed horses and record horses.

Q. Pedigreed horses and record horses?

A. Yes sir.

Q. Have those a well established value at certain places at certain times?

A. They have.

Q. In speaking about the rates of the different railroads I will ask you when it was that you obtained a rate from the Illinois Central and what the occasion of it was?

A. To get onto the horse special, the fast horse train on the Michigan Central.

Q. Was that before or after this law suit?

A. O, before.

Q. Now you said something about not wanting to contract with Mr. Eggleson. Mr. Patton's question was because you could not get accommodation, was that the case or what was it, tell the jury what was the reason why you didn't want to deal with Mr. Eggleson?

A. Mr. Eggleson always seemed to be too busy to attend to my wants, I had nothing against him at all, he just simply seemed to be too busy to attend to my wants and forgetful about it, and so I said that if we left it to Mr. Eggleson that he would not give me satisfaction, because he would forget it or negligent about it either too

much business or didn't care about my business, something of that sort, nothing against him.

Q. This paper that you signed, "Exhibit A" just tell the jury how it was held to you when you were asked to sign it?

A. I don't just remember, I remember this much that there is a grating, a place to slip the papers and things through and the gentle-
men says sign here and sign there.

88 Q. Was the paper folded or how was it at the time, in what shape was it?

A. The paper was folded up when it came to me that day, and he says sign there, then he opened the paper and turned it over and I signed here for the pass on the other side, and he just gave me one and he took the other.

(Here follows way-bill marked page 89.)



ACCOUNTANT'S ASSOCIATION STANDARD FORM NO. 101. (REVISED 1925)

THE CHICAGO & ALTON RA

WAY-BILL FO

WEIGHED AT

GROSS _____ LBS.
TARE _____ LBS.
NET _____ LBS.

ROUTE.

1 VIA	2 VIA
JUNCTION WITH	JUNCTION WITH

BY

WHEN A THROUGH RATE IS USED AND A SHIPMENT IS TO BE RE-HILDED EN ROUTE, THE SUBDIVISIONS MUST BE SHOWN IN THE RATE COLUMN IN ROAD ORDER, NOTING OPPOSITE EACH PROPORTION THE INITIAL OF THE ROAD TO WHICH IT APPLIES.	LENGTH OF MARKED CARS
---	-----------------------

FOR ADDITIONAL CHARGES, SEE

W.H. NO.

SHIPPER
CONNECTING LINE, BRANCH LINE, DIVISION
CAR AND WAGONS NUMBER AND
TYPE OF SHIPMENT

MAILED, CONSIGNEE AND DESTINATIO

H. D. Kirby

Using Diston & Co
New York City
N.Y.C.Laded 4 C
Pass

In care fast

ACCOUNTANT'S ASSOCIATION STANDARD FORM NO. 101. (REVISED 1925) REMOVING THIS WAY-BILL FROM CONNECTING LINE

1	2	3	4

RAILROAD COMPANY.

DATE

Jan 25 1906 SERIES NO. 1928

FOR FREIGHT FROM

Springfield Ill

TO

Joliet Ill

3 VIA	4 VIA	5 VIA	6 VIA	7 VIA	8 VIA	
FROM	JUNCTION WITH	JUNCTION WITH	JUNCTION WITH	JUNCTION WITH	JUNCTION WITH	
FT.	FT.	FT.	FT.	FT.	FT.	
OF CAR	WEIGH THIS CAR AT				CAR INT. 80766 6082	
CAPACITY OF CAR	LBS.	STOP THIS CAR AT			TRANSPERRED TO	
DATED	1906	WEIGHT OF CAR AND CONTENTS			INT. NO. AT.	
TON.	NO. OF PKGS.	ARTICLES AND CLASSIFICATION CARRIED (C. O. G. C. ETC. ETC. ETC.)	WEIGHT	DATE AND AUTOMOBILE	WEIGHT OF CARGO	INT. NO. AT.
60	14	26 horses	20000	14 25	29 90	40 60
ty				6.5		
		S. F. & L.				
		Rid. valued \$1000 Each				
		P. M Jan 24, 1906				
		M. J. Kirby in charge of car				
		horse train out of Chicago on M. & P. Ry about 3 P.M.				
		Thursday Jan 25 - 1906				

NOT STAMP IN ONE SPACES BELOW, IN CONSEQUENCE OWNERS, CARRIERS OR TRUCKERS WILL NOT TAKE PAYMENT FOR CARGO UNLESS STAMPED.

AMOUNT AT DESTINATION BY WHICH STAMP SHOULD BE PLACED ON DATE

5

6

7

8

DATE

TRAIN NO.

CONDUCTOR

TO BE FILLED IN BY

88

Q. What conversation took place between you and the gentleman at that time about the shipment of these horses?

A. I came in and asked him for my contract and he handed this to me, I says to him have they made arrangements at Joliet about getting me onto the Michigan Central, and he held up a way bill and says you see it is written across this way bill, those instructions, I says that gets there when I do have they made arrangements, he says they have attended to that, Mr. Stuttsman wasn't there.

Q. I would like to have that way bill.

Mr. PATTON: I have not the original, but have a copy of it.

Q. I wish you would look at that paper and see whether the general appearance of that paper is the same as the one he showed you as being the way bill?

A. It certainly, of course I seen the paper, the prior way bill is a different shaped paper as far as that is concerned, but there was the same writing across the bottom of the other but I didn't read what the writing was for he didn't let me have hold of it, he held it and flashed it this way.

Q. How much of it did you see, what did you see on it?

A. I just saw there was a line or two on the bottom that is all, he says you see the instructions are on here, I says that gets there at the same time we do, I wanted to know if he had made arrangements ahead, he says I am night man, I have nothing to do with that, they attend to that.

Q. With that understanding with Mr. Patton that he will have this identified, this is a copy of that paper, exhibit "B"?

Mr. PATTON: You say Mr. Kirby your recollection is when you signed this this paper was folded up?

A. I don't know just how it was folded up but he just shoved it through for me to sign there.

Q. Don't you know that this contract was signed in duplicate with a piece of manifold between this and the other and not folded up but flat out when handed to you to sign and there was one 91 given to you and one that the man kept there at the window wasn't there?

A. These were all made out before I got there, before I got to the office, and this was folded up, and he opened it and handed it to me, and said sign there and sign here, it was a long piece of paper we had, I don't know that it was open enough so that I could see anything there.

Q. Did you sign two pieces of paper?

A. I signed just that one.

Q. I hand you another piece of paper and show you the signatures, you say the one marked Exhibit "A" that is one?

A. Yes sir.

Q. That is the one you saw before is it not?

A. Well, they look so near alike I don't know which I saw before as far as that is concerned.

Q. You have identified the signature on Exhibit "A"?

A. Yes sir.

Q. Now the signature on this one I hand you and which I ask to be marked Exhibit "C" was apparently written at the same time and by the same pencil and under the same circumstances was it not?

A. That is my signature.

Q. Well, you know about the use of manifold paper Mr. Kirby?

A. Yes sir.

Q. Don't these papers to your mind show that one is a manifold copy of the other, and they were both signed at the same time through a piece of manifold paper?

A. It looks so here, yes sir.

Q. And the one marked "Exhibit C" appears to be the original does it not and the one marked "Exhibit A" appears to be the one that was signed through the manifold paper, one is 92 marked in red printing "Original" that is Exhibit "C" is it not?

A. Yes sir.

Q. And the one that you produced having been marked Exhibit "A" has in red ink printed across the face of it "Duplicate" has it not?

A. It looks so.

Q. Well, isn't it true, beyond the question of looking so?

A. That is true; well, this looks like the original to me.

Q. I ask you about the mark on the paper?

A. Oh, the mark on the paper, yes.

Q. As a matter of fact you did not use the pencil on paper to sign your name to the contract there on that occasion but once?

A. Yes and I signed it in two places.

Q. If your signature does appear in such way you cannot and do not dispute it is your signature, and the paper must have been executed in duplicate by a manifold sheet?

A. Yes sir.

Q. And you are contending that at the time this paper was handed to you it was folded up?

A. Yes sir, as I saw it, he just pushed it through and kept his hand on it and said sign here and here.

Q. We offer both Exhibit "A" and "C" as being the contract under which this shipment was made.

The COURT: At this time you cannot offer it as substantive evidence, you can have it identified on cross examination and hold it up until your time comes.

Mr. PATTON: Then I will not offer it. I desire that to be identified as being the original and duplicate of the same paper executed at the same time.

Mr. SALZENSTEIN: That we don't concede one is marked original and one duplicate that don't show.

93 The COURT: He has made such identification as he is able to make by this witness any way and when his time comes to offer it we will see it is proper to identify papers by the man making them on cross examination, and withhold them until the time comes for offering his evidence.

MR. PATTON: How many conversations did you have with Mr. Stuttsman about this thing; first you had one conversation at your shop, that was about ten days before the shipment?

A. Yes sir.

Q. Then when was the next conversation and where?

A. Probably four or five days before I shipped.

Q. Was that at your shop?

A. Yes sir.

Q. When was the first time that you went with Mr. Stuttsman to the freight depot?

A. The first time that I ever met him when he come to get the load.

Q. That was on the occasion of the first conversation?

A. The first conversation.

Q. You went from your shop to the depot?

A. Yes sir.

Q. Was it then you had a conversation between Mr. Stuttsman, Mr. Eggleson and you in which the rate was given?

A. No sir, I asked for the rate at that time, asked them to give me a rate.

Q. A Rate was not quoted then?

A. No sir, they didn't know the rate.

Q. And when was it you went again to the freight depot and secured knowledge about the rate?

A. I didn't go Mr. Eggleson called me up.

A. On the telephone?

A. Yes, I called him up the next day and asked him if he had got that rate, he said he had entirely forgotten it and I said 94 don't forget it for I mean business, and the next day he called me up and he says I have got that rate, all right, let us have it, \$170.60.

Q. Well, were you with Mr. Stuttsman on any occasion at the freight depot except the first occasion when you were over there that you have told about?

A. I think never.

Q. The second time then that you went to the freight depot was when you went on the night of the shipment and got this, signed this contract.

A. No sir, I was there afterwards to see if the car had arrived.

Q. On what day was that? The same day of the shipment?

A. O, no, it was probably Friday or Saturday before I shipped Wednesday, Saturday probably.

Q. With whom did you have a conversation on that occasion?

A. I didn't see Mr. Eggleson there, so I went out and talked to the yard master.

Q. That was simply with regard to getting the car?

A. Getting the car to the fair ground.

Q. You wanted the car to go to the fair ground because the horses were at the fair ground is that it?

A. Yes, sir.

Q. And then as I gather, you were at the freight depot three

times, first on the occasion that you went with Mr. Stuttsman second, when you went down and had the talk with the yard master about the car, third, when you went there the night of the 24th of January when this contract was signed?

A. Yes sir, and I was there one other time and if my memory serves me I saw Mr. Eggleson on that time and asked him to put the water in the car.

Q. Was that after the conversation with the yard master?

95 A. Somewhere about the same time, no, just before that. Q. Before you had the conversation with the yard master?

A. Yes sir.

Q. Was there any conversation at that time other than about the water in the car?

A. And getting the car to the fair ground.

Q. You went there in order to tell him where you wanted the car put?

A. Yes sir.

Q. And that is all that took place at that time?

A. Yes sir.

Q. Then four times you were at the depot, first with Stuttsman?

A. Yes sir.

Q. When you had a conversation about what you wanted?

A. Yes sir.

Q. In which you gave directions to ship by Joliet?

A. Yes sir.

Q. And in which you told them you would not order any car until the rate was made?

A. That is right.

Q. Then on some days later after Mr. Eggleson had telephoned you about the rate and you told them where you wanted the car put and you wanted it ordered?

A. This conversation about where the car would be put was when I made arrangements, or was making arrangements, the understanding was to load at the Fair ground, the roads will take loads from the fair ground or put it back, but not a piece of a load in the same contract.

Q. That was in the first conversation?

96 A. Yes sir, in the first conversation, about shipping to New York yes sir.

Q. And the second time you went over was after you had talked with Mr. Eggleson over the telephone, and in that conversation it was about putting water in the car?

96 A. Understand this talk about putting the car out etc. was at my shop with Mr. Stuttsman.

Q. Not in the presence of Mr. Eggleson?

A. No sir.

Q. At the second conversation related merely, the second conversation at the depot related merely to putting the car out at the fair ground and having water in the car?

A. As I remember it that was the first conversation when Mr. Stuttsman came into my shop, and took me then over to Mr. Eggleson, that I would consider the first time I had a conversation,

Q. You have named four times when you were at the freight depot, identify those times, there was the first time when you went with Mr. Stuttsman, that is right is it, to the freight depot the first time you went to the freight depot about this matter was the time you went with Mr. Stuttsman, about ten days before the shipment?

A. Yes sir.

Q. Then you had a conversation with Mr. Eggleson about the rate?

A. Yes sir.

Q. You then went over to the depot about having water put in the car?

A. After the car arrived, yes sir.

Q. You then went over to see the yard master or to see Mr. Eggleson and did see the yard master?

A. It might have been the same time, all in the same time, I went out there to examine the car, etc.

Q. You are not definite whether you were at the depot three or four times?

A. I said I was there four times or more in looking after the car, getting feed in and such as that.

Q. Were you in the depot on these various occasions?

A. I stepped into the depot yes.

Q. Went into that office where Mr. Eggleson had an office
97 at the south end of the corridor?

A. I did not, If I wanted Mr. Eggleson I went to the window and called for him.

Q. I say you were in the part of the depot where there is a long corridor?

A. Yes sir.

Q. And at the south end a closed door behind which Mr. Eggleson sits?

A. I was in there just once, that was in the first conversation when Mr. Stuttsman asked him to fix Kirby up with a car etc.

Q. That was in Mr. Eggleson's office?

A. Yes sir.

Q. On the other three or more occasions you were at the depot you were in the depot in the corridor in front of the grated window?

A. Yes sir.

Q. And not in Mr. Eggleson's office?

A. I think not.

Q. Now as I understand you Mr. Kirby, your testimony in regard to this contract is that for \$170.60 the Chicago & Alton Railroad Company through Mr. Stuttsman agreed to ship your horses from Springfield to the City of New York and agreed positively that that earload of horses should go by way of Joliet, and should be attached to the fast horse special which left Chicago about three o'clock in the afternoon of January 25th?

A. That is the fact.

Q. That is what you say the contract was?

A. Yes sir.

Q. That you were to have a guarantee that that earload of horses

should go by way of Joliet and should be attached to the fast horse special leaving Chicago in the afternoon of January 25th.

A. Yes sir.

98 Mr. PATTON: Now for the purpose your honor, of the record, I desire to move to exclude all of the testimony of this witness with reference to the terms of the special contract set out and alleged in the declaration, and testified to by him, first, on the ground that Mr. Stuttsman as Live Stock Agent of the Chicago & Alton Railroad Company, had no power or authority under the rules of the company and under the law and rules of the Interstate Commerce Commission to make any such special contract; and second, on the ground that any such special contract, if made, would be wholly illegal and void under the law and under the rules of the Interstate Commerce Commission and the classification and tariffs which are stipulated to have been duly filed and published in the office of the Chicago & Alton freight depot at Springfield, Illinois.

Motion overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: I desire further to move to exclude the testimony as to the special contract, on the ground that the evidence shows the signing of a written contract after the date and time of the alleged making of the special contract, which under the law would become the contract between the parties.

Motion overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: And as further grounds for such motion I desire to allege that the testimony of this witness that he did not know what was or were the terms of that contract or of the matters and things contained in it does not prove or tend to prove that he had no such knowledge, but that on the contrary under the law and under the rules of the Inter State Commerce Commission he is charged with notice of the terms and conditions of that contract, by reason

99 and by virtue of the quoted rates of \$170.00 which is the rate provided by the Chicago & Alton Railroad Company and other railroad companies in their general interstate traffic arrangements set out in the joint interstate tariff then in force, and duly published, filed with the Inter State Commerce Commission and published for the shipment with a limited liability and at a limited valuation of one hundred dollars per animal.

Motion overruled by the Court. To which ruling of the court the defendant by its counsel then and there excepted.

CHARLES T. SEAGO being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Es-q. testified as follows, to-wit:

Q. Just state your name?

A. Charles T. Seago.

Q. Where do you live?

A. In Springfield.

Q. How long have you lived here?

A. Almost three years.

Q. What is your business?

A. I run a boarding bar.

Q. Are you acquainted with Mr. Kirby the plaintiff in this suit?

A. Yes sir.

Q. Are you acquainted with Mr. Stuttsman?

A. Yes sir.

Q. How long have you known those two gentlemen?

A. Well, I have known Mr. Stuttsman about twelve or fourteen years perhaps, and Mr. Kirby I have known of him a great while, I never knew him well until about the last three years.

Q. Do you know where Mr. Kirby's horse shoeing establishment is?

A. Yes sir.

Q. Where is it?

A. Well, on Jefferson street the second door east of 4th street on the north side of the street.

100 Q. Do you remember being present at any time in January 1906 when a conversation took place between Mr. Stuttsman and Mr. Kirby in relation to the shipment of a carload of horses?

A. Yes sir.

Q. You may tell the jury how much of that conversation you heard, what it was that you heard take place between them?

A. I don't remember how I came to go to the shop, whether I went to the shop with Mr. Stuttsman, the barber shop I shave at sometimes is not far from that barn, and he said he was going over to Kirby's, and I don't know that I had any business there, but anyhow I was going to the shop, we had a conversation there at the shop and I said I am going over as well as I remember, and when we stepped in the shop he said something to Mr. Kirby about that you are shipping just at the right time for your horses will be put on the fast train, or something about a fast train, I don't remember just the words, and Mr. Kirby says have you made all arrangements, something to that effect, and Mr. Stuttsman says I have not. Well He says if you haven't I will ship over another road, and Mr. Stuttsman says well I will look after that for you, or something to that effect, and Mr. Kirby said all right, as well as I remember.

Q. When was this conversation?

A. A day or two before Mr. Kirby shipped his horses as well as I remember, I don't know just what period of time.

Q. Do you remember when Mr. Kirby shipped his horses?

A. Remember the date?

A. Yes?

A. No sir, I remember the time well, but I could not call the date.

Q. That conversation was some time before that?

A. Yes sir.

Q. Mr. Stuttsman is the gentleman who sits there is he?

A. Yes sir.

101 Q. The dark complected gentleman with a moustache?

A. Yes sir.

Mr. PATTON: We won't deny his identity.

Mr. SALZENSTEIN: No, but I wanted to identify him.

Witness on cross examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. All you remember is that Mr. Kirby inquired whether he had made arrangements?

A. Yes sir.

Q. Mr. Stuttsman said he had not?

A. Yes sir.

Q. Mr. Kirby then said that if he could not make the arrangements, or did not make the arrangements he would ship over some other road?

A. Yes sir, something like that.

Q. Then Mr. Stuttsman said he would make arrangements?

A. Yes sir.

Q. Nothing said about what the arrangements were to be that you know of?

A. No sir.

Q. And that was about two or three days before the shipment?

A. Something like that I think, yes sir.

Mr. SALZENSTEIN: Do you remember the words that Mr. Stuttsman used when he said he would make arrangements?

A. Something like he would guarantee, or that he would see that he was taken care of Mr. Kirby said that is all right, as well as I remember the words.

SHERIDAN GILMORE being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows, to-wit:

102 Q. State your name to the jury?

A. My name is Gilmore.

Q. Where do you live?

A. Springfield.

Q. How long have you lived here?

A. It will be three years the 25th day of April.

Q. What is your business?

A. Horse shoer by trade.

Q. At what place do you work?

A. I work for Mr. Kirby.

Q. How long have you worked for him?

A. The 25th of April will be three years.

Q. Were you working for him in January 1906?

A. Yes sir.

Q. Do you know Mr. Stuttsman of the C. & A. Railroad, Stock Agent.

A. I know him by hearsay that is all.

Q. I call your attention to this gentleman sitting back there?

A. I saw him several times.

Q. Do you remember of his being in Mr. Kirby's place of business some time during that month?

A. He come in there two or three different times I think.

Q. Do you remember hearing any conversation between him and Mr. Kirby relating to the shipment of horses?

A. I heard him and Mr. Kirby talking over the shipment of some horses to New York State.

Q. Just tell what you remember about that conversation?

A. Well, there wasn't much conversation about it.

Q. Well the first one?

A. He seemed to be anxious to solicit the horses to ship for the C. & A. and he told Mr. Kirby——

Q. What was said in that conversation?

103 A. Mr. Kirby told him if he had not made arrangements to take him to New York City by way of this town of Joliet and put him on the fast train, fast horse special, the train run three days a week as I understood him to say.

Q. Was anything said as to the kind of horses?

A. No sir, nothing was said about the horses, just a good carload of horses.

Q. What else was there in that conversation?

A. He told Mr. Kirby, he says I will ship you by way of Joliet and connect you with a horse special out of Joliet the next morning by shipping out of here in the evening and get them into this town the next morning and he would make connection with this fast train to New York City and I forget what day he told him he would arrive in New York City but something like three days and three nights, and Mr. Kirby told him if he hadn't made every arrangement he wanted to know it, if you haven't he says I will ship over the Wabash road yet, but he seemed to be more anxious to get the load over his road, and Mr. Kirby told him if you have made those arrangements and guarantee so and so I will go with you, he said all right and walked out.

Q. When was this conversation you speak of?

A. Well sir, it was the last part of January 1906.

Q. With reference to the time when Mr. Kirby shipped when was it, do you know when Mr. Kirby shipped?

A. Yes, I know when he shipped, he shipped about the last week in January.

Q. In reference to that when was it?

A. Why, it was a day or two, two or three days before the carload of horses were out, were shipped out.

Q. Do you remember who else was present at that conversation?

A. Yes sir, I mean there was other men in there that didn't hear the conversation, they were too far away.

104 Q. Well, I mean was any one near there besides yourself?

A. Doc Seago, we call him Doctor, he is Mr. Seago.

Q. That is the conversation you have now given?

A. Yes, there was two or three other strangers in there at the same time, but I don't know who they were, they went away out of town men.

Q. You speak of Mr. Stuttsman being in there several times?

A. Yes sir.

Q. Was Mr. Kirby there on those occasions?

A. No sir, he happened to be out in the city somewhere.

Q. What was he in there for?

A. He asked me one time, I didn't know who the gentleman was so finally I asked Mr. Kirby who he was, and by making myself acquainted with him, he asked me for Mr. Kirby.

Q. All I want to know is if he inquired for Mr. Kirby on those occasions?

A. Yes sir, that is the way I got to find out who he was.

Witness on cross-examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. At how many conversations between Mr. Stuttsman and Mr. Kirby were you present?

A. Just one.

Q. That is the one you have testified to?

A. Yes sir.

Q. In which that thing took place you have stated in answer to Mr. Sulzenstein's questions?

A. Yes sir.

Q. And that was about two or three days before the shipment of the horses?

A. Something like it prior to the time he got the car ready and ordered the car.

105 W. C. DUNHAM being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows, to-wit:

Q. State your name.

A. W. C. Durham.

Q. Where do you live?

A. Springfield,

Q. How long have you lived here?

A. Three years a little over.

Q. What is your business?

A. I am a horseman.

Q. Are you acquainted with N. T. Kirby the plaintiff to this suit?

A. Yes sir.

Q. How long have you known him?

A. O, I have known him for twelve or fifteen years I guess.

Q. Do you remember the shipment of these trotting horses by him over the C. & A. Railroad?

A. I do.

Q. The latter part of January, 1906, to New York City?

A. Yes sir.

Q. What do you know about that of your own knowledge, did you accompany that shipment?

A. I did.

Q. Now tell the jury what time you left Springfield here? What time you got to Joliet first?

A. We left here at 8:15 January 24th p. m. and arrived in Joliet at six o'clock a. m. the next morning.

Q. When did that carload of horses leave Joliet?

A. Somewhere around eight o'clock.

Q. In the evening?

A. In the evening.

106 Q. Where did they go from Joliet?

A. I suppose we went to a place called Lake.

Q. And how long did they stay at Lake or what time did you get to Lake first?

A. I could not tell that exactly.

Q. When did they leave Lake if you remember?

A. No sir, I don't remember that.

Q. Well now, after leaving Lake how did you travel?

A. We traveled by rail.

Q. What kind of train were you on?

A. Well I don't know it was in the night and I didn't take any particular attention to the train.

Q. Well, in regard to the stoppage of that train?

A. It didn't seem to be a fast train no.

Q. In regard to the stoppage of the train where did you first stop?

A. Well, I don't know where the first stop was.

Q. The first long stop?

A. The first long stop.

Q. Have you any memorandums made at the time?

A. Yes sir.

Q. You may refer to them and refresh your recollection?

A. Yes sir, my memorandum after we left Joliet commenced January 26th at Wayne eighteen miles west of Detroit at 11:25 a. m.

Q. What date?

A. January 26th.

Q. How long did you stop there at Wayne.

A. Well, I don't know how long we were there, but we were at West Detroit at 12:30.

Q. How long did you stay at West Detroit?

A. Just one hour.

107 Q. What was done at West Detroit if anything?

A. Nothing only a little switching.

Q. After you left Detroit where did you go, where was the next stop?

A. In Detroit at 2 P. M.

Q. How long were you in Detroit?

A. Well, I could not tell that, how long?

Q. About how long if you know from recollection?

A. No.

Q. Do you know what was done if anything with the train at Detroit?

A. No I do not.

Q. Where did you next stop?

A. The next stop was at Windsor, Canada.

Q. What time was that?

A. At 5.15.

Q. And how long did you stop at Windsor, Canada, is Windsor, Canada right across the river from Detroit?

A. From Detroit.

Q. How long did you stay at Windsor?

A. I don't know that Mr. Salzenstein.

Q. Do you know what was done with the train while you were in Windsor?

A. No, sir.

Q. You don't remember?

A. No, sir.

Q. To refresh your recollection I will ask you if this was not a meat train?

A. Well, I rather think it was, yes, I think it was.

Q. Do you remember whether or not the cars were iced, ice put in the cars?

A. Yes sir.

108 Q. What was done?

A. They were iced.

Q. You don't remember when you left Windsor?

A. At 5.15, no, we were at Windsor at 5.15, I don't know when we left.

Q. When did you leave?

A. I don't know.

Q. Where was the next stop?

A. I didn't keep any more memorandum of it then until the next morning at 6.45.

Q. Where were you then?

A. We were then at Windsor.

Q. At Windsor at 6.45 the next morning?

A. Yes, sir.

Q. You didn't leave Windsor until 6.45?

A. No sir, there is where Mr. Kirby paid our fare to St. Thomas before we left.

Q. Where was the next stop you remember or have a memorandum of?

A. The next stop was in Pillsbury, Canada.

Q. What time did you get there?

A. We were there at eight P. M.

Q. How far is that from Windsor?

A. I don't know.

Q. How long did you stay there?

A. There just one hour.

Q. What was done with the train if anything during that hour?

A. Well, we were switched around icing up cars.

Q. Where was the next stop you have a record of?

A. About ten o'clock A. M.

Q. The next day, where was that?

A. Ten o'clock P. M. it was ten o'clock P. M.

109 Q. The same day?

A. The same day, yes sir.

Q. Where was that?

A. That was at St. Thomas, Canada.

Q. How far is that from the last place if you remember?

A. I can't tell you.

Q. How long did you stop at St. Thomas?

A. Well, I don't think we were at St. Thomas very long if I remember rightly. I haven't any memorandum of it at all.

Q. Where is the next stop you have a record of?

A. The next stop was at Buffalo.

Q. What time did you get there?

A. No, hold on, we were not at Buffalo on January 27th we were at 6.45 A. M. still in Canada about an hour later we learned we had been laid out between St. Thomas and Buffalo on account of a wreck at St. Albans, Canada.

Q. What time did you get to Buffalo?

A. About 9.15 I should judge in the morning.

Q. How long did you stay at Buffalo?

A. Well, I could not tell just how long we stayed in Buffalo.

Q. Have you any recollection as to whether it was a long or a short time?

A. I have a recollection nearly every stop we made was long enough.

Q. Do you remember whether anything was done with the train or not at Buffalo?

A. Nothing more than icing up the cars again.

Q. How was that done, tell the jury how they would ice those cars.

A. There is an ice house right along the railroad, they would just pull up the car of meat, I suppose it was meat, I never investigated, and ice two of those cars to keep them cool.

110 Q. How would they put that ice in there in place?

A. From the ice house through a chute.

A. Well, in doing that how were the cars moved?

A. Well, they would just move up the next car.

Q. Now you don't remember what time you left Buffalo?

A. No sir.

Q. Where is the next stop you have a record of?

A. The next stop was at Niagara Falls.

Q. Is that this side or the other side of Buffalo, the stop at Niagara Falls before you get to Buffalo or after?

A. After I think.

Q. What does your record show?

A. It says Niagara Falls at 10.45 A. M.

W. What day was that?

A. I have not got the date here.

Q. Well from Niagara Falls, what time did you leave there?

A. We left there about 11.25.

Q. Where was the next stop you have a record of?

A. I guess we were at Niagara Falls however before we were at

Buffalo, we were housed up in the horse car and I could not tell all the time where we were.

Q. Now after leaving Buffalo where was your next stop that you have a record of?

A. Well, the next stop would be Niagara Falls.

Q. After leaving Niagara Falls and Buffalo where was the next stop?

A. The next stop was at Albany, New York.

Q. How long did you stop there?

A. We were there about six hours.

Q. What were you doing while you were there, what was being done with the car if anything?

A. Nothing at all.

111 Q. Now about what time did you leave Albany?

A. We left Albany about six o'clock or 6.30.

Q. And what was done if anything about icing the cars at Albany?

A. Well they iced the cars all up there.

Q. The icing was done the same way you describe it at other places?

A. Yes sir.

Q. Well, what time did you get into New York?

A. What time did we get into New York?

A. Yes, New York City?

A. We got in New York City about six o'clock.

Q. At the place where the car was switched off what time did you get there?

A. That was the station we were first at, 130th street.

Q. About what time was that do you remember?

A. That was six o'clock.

Q. In the morning?

A. Yes sir.

Q. On what day of the month or week?

A. January 29th I think and know.

Q. Tell the jury the condition of these horses along the road prior to getting to New York and when you got there?

A. Well the horses rode fine from here to Joliet, and they stood up pretty well and behaved themselves nicely at Joliet while standing on the switch, we were not switched around there, and they rode very well until we got to Canada, of course they began to get a little tired and the longer they were on the road the tierder they got.

Q. Well, did you notice any sickness amongst any of them?

A. Not until Sunday evening.

Q. What did you notice then?

112 A. I noticed we had one filly that appeared very sick.

Q. What was the name of that filly?

A. Lou Blake.

Q. In what way did she show sickness?

A. Well, her nostrils extended and her ears kind of down, didn't seem to have any life to her just at the time.

Q. How was that condition when you got to New York?

- A. It was getting worse all the time, it was very bad.
Q. When you got to New York was any veterinary called?
A. Right away.
Q. Do you remember his name?
A. No sir.
Q. At what place?
A. He was an assistant of Doctor McCully's is all I know.
Q. What was the condition of these other horses when you got to New York?
A. Well, outside of their being tired and kind of dead on their feet there was nothing serious the matter with them.
Q. Were you present when they were taken to the Madison Square Garden?
A. Yes sir.
Q. What was their condition then?
A. O, they were tuckered and hadn't time to fill up yet.
Q. How about being tired and knotted up?
A. Yes, they were tired and sore.
Q. What effect had their condition on them when they were shown at Madison Square Garden?
A. Very bad effect.
Q. In what way, tell the jury?
A. The horses were not able to extend themselves and show to what they should have done.

113 Witness on cross examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

- Q. When the horses got to Joliet you say they were in good shape?
A. Yes sir.

A. L. THOMAS being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows to-wit:

- Q. State your name to the jury?
A. A. L. Thomas.
Q. Where do you live?
A. Omaha, Nebraska.
Q. How long have you lived there?
A. Seven years.
Q. What is your business?
A. Farming, trainer and developer of trotting horses and buying and selling horses.
Q. How long have you been in the business of training and developing trotting horses and handling and developing them?
A. About twenty five years.
Q. What connection if any had you with the Madison Square Garden sales in New York City?
A. I am connected with the Fasig-Tipton firm in the capacity of showing and handling of the horses that are offered there for sale.

Q. How long have you been so connected with them?

A. Ten years.

Q. How often are these sales held in New York City?

A. O, the latter part of November and first of December which we call the Old Glory sale, and the last week in January and sometimes merging into one or two days in February called the Mid-Winter sale of each year.

114 Q. The latter part of November and first of December, and the latter part of January and first of February?

A. Yes sir.

Q. Will you describe to the jury the manner in which those sales are conducted?

Objected to by defendant on the ground that the manner and conduct of these sales is not a matter of relevance or importance or admissibility in this case.

The COURT: I am of opinion the objection is well taken, if he was present when these horses were sold.

Mr. SALZENSTEIN: He was present, and I want to show if any condition in the sale of these horses to show they did not bring the fair market value, that is the purpose of it.

The COURT: I think it would be entirely sufficient in chief at least, to show how these horses were sold at that public sale at that public market, how they were sold, and if they want to raise any question about it it will develop later.

Mr. SALZENSTEIN: Well, conducted in any way different from ordinary sales to show there was no collusion, in the examination of Mr. Kirby Mr. Patton intimated something of that sort and I wanted to cover it.

Mr. PATTON: I stated in the argument such thing might take place.

The COURT: I think it is entirely sufficient in chief at least for you to show, having shown this to be a sale established and all that, for you then to show the manner in which these horses were sold, I don't want to get it involved any further than is necessary.

Q. How long have these sales that you speak of been conducted at that place?

A. Under the present administration twelve years I think.

115 Q. What kind of sales are they with reference to being private or public and the number of people that come?

A. They are called combination sales, horses are consigned from nearly every state in the union where horses are raised, from California to Maine.

Q. What notice is given to the public of those sales?

Objection by defendant to the notice given to the public. Objection sustained by the court.

Q. Have you had any experience in the shipment of horses for long distances, high bred horses, trotting horses?

A. All kinds of horses for the last twenty five years.

Q. What has been the nature and extent of your shipments?

A. I ship a carload nearly every year to the New York sales and frequently ship one and two car loads back that I buy down there.

Q. What effect if you know has a long shipment or long stops on horses of the character I have mentioned, in shipping them a distance of nearly a thousand miles.

Objected to by defendant, that is hardly a subject for expert testimony when we have gotten people the testimony of people who were with the horses as to the actual fact, it is entirely speculative, depends on the individual horses, the time of the year, and depends on so many elements that it could not be made identical, and we object to the general effect.

The COURT: As to the effect on these horses you had the testimony of two witnesses as to the effect it had on these particular horses, does not that meet the requirements for the present at least?

Mr. SALZENSTEIN: To some extent, this witness also shipped a load on this same train that Mr. Kirby's horses were to go on, and

I want to follow that up by asking him in regard to shipments of horses by this other train so as to show as well as we can that this condition Mr. Kirby speaks of was occasioned by this slower means of transportation.

The COURT: Well, proceed for that purpose within reasonable lines.

To which ruling of the Court the defendant by its counsel then and there excepted.

Q. What effect if you know has a long shipment or long stops on horses of the character I have mentioned, in shipping them a distance of nearly a thousand miles?

A. Well, for every stop and every hour longer they are on the car of course it makes a vast difference, for the simple reason physically they become more tired, all classes of horses, and I ship cattle also, in stops they become uneasy, one will lie down and are liable to injure themselves, they become fretful and get warm, that holds with all classes of horses, it don't make any difference what kind of horses.

Q. Any difference in regard to high bred horses?

A. Not exactly. I have had the same condition arise in all kinds and classes of horses.

Q. Now Mr. Thomas, in your shipments east have you ever had occasion to ship by way of Joliet on what is known as the fast horse train on the Michigan and New York Central Railroad?

A. Yes, I have shipped that way a great many times.

Q. Now you may tell the jury about that shipment, about the movement of the trains, stoppage and the like and what time they reached destination?

Objection by defendant to what preceding experience of this gentleman has been with regard to making railroad connections which are subject to change at a moment's notice, and the time at places vary and conditions vary.

Q. No, I am speaking of this very train, the horse special we were to be placed on?

117 Mr. PATTON: Just so, and his shipments have been from Omaha, a connection entirely different, the entire environment different and we object.

Mr. SALZENSTEIN: I simply ask him from Joliet by way of the Michigan Central and the New York Central on what is known as the fast horse special.

The COURT: I am inclined to the view that you might interrogate him as an expert as to the probable effect, probable difference in the condition in which the horses would arrive upon the scheduled time of this shorter train, and the time in which the cars actually arrived there with the horses, I am inclined to think that is evidence in chief, it is not competent for him to give his past experience, he testified here as an expert.

Mr. SALZENSTEIN: And also as having actual knowledge of this particular train, one of the trains, I presume that these gentlemen will agree that if these horses had been shipped on the horse special they might have reached there in the same condition, we want to show how that horse special travels and also the condition of the horses.

The COURT: You can have in evidence what the schedule time of the train was, *prima facie*, tentative procedure, that it would make its schedule time, this man testifies as an expert and he may in my opinion safely be allowed to give his opinion as to the difference in conditions the horses would arrive on this fast schedule time and the conditions you say they did arrive on this other time, but I do think it is entirely improper for him to give detailed experience he has had in making other shipments upon this same train.

Mr. SALZENSTEIN: Something was said by Mr. Patton both in his argument and during the examination of Mr. Kirby in regard to this particular train that leaves Joliet in the morning con-

118 nection with the horse special on the Michigan Central and he says the Michigan Central don't carry horses on that train, and to carry on that train if indulged in would be bad for the horses, I want to show by this witness the condition of horses on that train and the effect of the carriage on those horses.

The COURT: I cannot call to mind any rule of evidence that would make that competent, experts testify upon a hypothetical state of case, and do not give individual instances or experience unless in cross-examination about it they might test him by his experience and by his observation and all that, it seems to me if you use him in chief for substantive evidence you have to rely on hypothesis.

Mr. SALZENSTEIN: I will proceed first on the theory of expert, and then proceed on the other theory and the court can make the record.

The COURT: He had no experience either this identical shipment, and cannot testify about it, this shipment was not made by the fast route, therefore it cannot be treated as having done so, there is a fast route, this man had qualified as an expert shipper, he has testified as to the effect of a prolonged journey, he may testify as to the effect of a quicker and more rapid journey.

Mr. SALZENSTEIN: We want to show not only the effects of the journey but he knows about the schedule time of this fast train.

The COURT: He could not tell how it was stopped on any particular trip.

Mr. SALZENSTEIN: No, but we will follow that up, we have the telegraph schedule on that particular train.

The COURT: I think the scheme I have given you is the only safe scheme, I have had a great deal of experience in trying to get along with expert testimony where I allowed the expert in chief to give his experience in road cases.

119 Q. Assuming that this horse special left Lake at 3 P. M. on January 25th, reached East Buffalo at 4.20 P. M. on January 26th was there unloaded and left at 6.20 P. M. the same day, and reached New York on January 27th, at 8.20 P. M. what would you say would be the condition of the horses compared to what it would be upon a train leaving Lake at between 12 and 2 o'clock on the morning of the 26th of January and reaching New York on the morning of the 29th of January between 6 and 8 o'clock in the morning?

A. I would like to ask a question, that would be a difference of about 48 hours in transit wouldn't it?

Q. The difference in time?

A. Yes.

Q. Somewhere in the neighborhood of 40 hours I should judge.

A. Well, my experience would be in shipping a car load of horses that length and that distance that any time you was out twelve to thirty six hours that the danger of injury is materially added to, for the simple reason the horses are becoming tired and worn out and it is for that special reason that this horse special had been gotten up by the Michigan Central whereby we can ship horses to those points without wearing them out, and for every twelve hours you would add I would not say as to what injury could be done, in some cases I have seen horses that it did not do any injury, while in numerous cases it has decreased the value of my horses an unknown value as far as that is concerned, in that class of horses.

Objection by defendant to what happened to his individual horses in numerous cases, and ask that it be stricken. Objection sustained by the Court about what he says about the effect it has had on his own horses in his various experience, that is not to be considered by the jury, that is stricken out.

120 Q. Was that condition that you speak of, or would that condition be lessened or aggravated if those horses had been loaded on cars on the evening or afternoon of January 25, 1906, and had been in transit from Springfield to Lake, a distance of probably two hundred miles up to the time that they left Lake at from 12 to 2 o'clock P. M. on the morning of the 26th?

A. Yes sir, the danger is greater for the simple reason after having been on the car the first night they become more uneasy and restless, standing, while if they could be moved if possible eight nine or ten miles and started again they would only become restless, but stand-

ing and changing from one foot to the other you understand is where the restlessness begins, if they had to stand twelve hours or eight hours rather they would stand forty minutes at a time forty minutes at a time or sixty minutes standing between and so on.

Q. I want to show if I can there are very few stops and those of short duration with this horse special as compared with the meat train.

The COURT: Probably that is included in their scheduled time itself.

Q. I am trying to get it if I can, these gentlemen stated they would produce it.

Mr. PATTON: Well, the agent representing the Michigan Central is here and says he has the schedule time of the Michigan Central and the New York Central, has it down at the hotel, we will produce it if you desire.

Q. I think it is better for us to have it so we can cover every phase of this matter showing the difference between these two trains, I will proceed now; did you see this fourteen head of horses of Mr. Kirby's with reference to which suit is brought?

A. Yes sir.

Q. Where did you see them?

121 A. I first saw them at Madison Square Garden New York.

Q. When?

A. Well, I am not certain as to the date, it was the morning of the day that they were sold.

Q. What condition were those horses in?

A. Well, they were bad.

Objection by defendant to the answer. Objection sustained by the Court and the answer stricken.

Q. Tell the jury what you mean, we don't want your conclusion, just describe the condition?

A. I will answer that question in saying how I saw them.

Q. How did they appear to you when you saw them there?

A. Mr. Kirby came to me on the morning of that day and says—

Q. Don't tell what he said.

A. I have got a string of horses here I want you to exercise and try before the sale. I took each one of these individual horses and exercised it, and I found that they were sore as we call it in trotting parlance, could not untrack themselves otherwise could not extend themselves, and I said to Mr. Kirby—

A. No just what you saw?

A. I tried each one individually and put them away and reported upon their condition to Mr. Kirby as I found it.

Q. What was the condition that you found there, then and there?

A. I have tried to describe them by saying they were sore, tired, worn out no life whatever.

Q. What in your opinion produced that condition?

A. The shipment.

Q. What kind of shipment?

A. Well, I don't know what kind of shipment, it was a shipment pure and simple, for the reason I didn't know at that time and only what I have heard here what it was.

122 Q. Assume those horses left Springfield on January 25th at 8 o'clock loaded in a car at 4:20 P. M. of that day, then taken to Joliet, reaching there at 6 in the morning, leaving Joliet in the afternoon and running to Lake, and being put on a train, leaving Lake from 12 to 2 o'clock known as the meat train, which stops at various places for a considerable length of time, and at some of those places the cars were iced up, the cars being moved forward one at a time, and not reaching New York City until 6 or 8 P. M. on the morning of the 29th of January what would you say as to that causing the condition you saw?

A. Well, I should say that caused it for the simple reason that was the main thing as I stated a moment ago thirty hours longer on the train with frequent stops, longer stops, I would say that was the direct cause of causing or aggravating the cause.

Q. Now did you notice one of these horses called Lou Blake?

A. I did.

Q. Did you notice anything about her in addition to what you have stated about the other horses?

A. Yes sir.

Q. What was it you noticed about her?

A. I noticed she had been in the hands of a veterinary surgeon a mustard plaster had been applied at each side owing to the fact that she had caught cold and had what we call pneumonia.

Q. Now did this condition have any effect on the selling prices of those horses on that market at that date?

A. I will answer as to a portion of them, I cannot recollect all of those horses, fourteen horses.

Q. I don't ask you in detail, just answer that question?

A. I would say yes.

Q. Take the mare known as Lou Blake, what in your opinion was the difference in her market value in the then condition she 123 was in and the condition that she would have been in had she had the shipment, the much shorter shipment you have spoken of?

Objected to by defendant on the ground that no man on earth be an expert or non-expert could answer that. Objection sustained by the court, the Court remarking the inquiry should be what would be the difference in value in the condition as she then was and her condition if she had been in reasonable condition under the circumstances.

Q. What was the difference in her market value at that time and place between her then condition and had she been in reasonably good condition?

A. I will answer that by saying had she got there in reasonable condition her market price would have been from five or six times

what it was, my recollection is she brought between four and five hundred dollars, I cannot state positively as to that for other reasons.

Q. What do you say she would have brought on the market if she had been in reasonable condition?

A. From twenty five to thirty five hundred dollars.

Q. Now take the horse known as Rythmac Bell you remember that horse do you?

A. I remember him well sir.

Q. What in your opinion was the difference in value on that day and place in the condition that he was in and what would have been the value had he been in reasonably good condition?

A. Can I make a statement in regards to the markets down there what a great deal of this hinges on the value of the horse?

The COURT: It is entirely sufficient in chief for you to give your opinion now, and if they want any particular reason they will ask you for it.

A. In my judgment the difference in the price that he brought and what he would have brought had he shown properly would have been from two to three hundred per cent or in other words from three to four thousand dollars.

124 Q. Are there any of these other horses that you remember by name?

A. Yes I do there is two other- that I do.

Q. What are they?

A. One the mare called Varinique, and theo ther one is that geling the name has gotten away from me.

Q. Take the first one?

A. Verinique, I could tell the breeding &c. and the other mare is a mare of the dam of Verinique.

Q. Take Verinique first?

A. Verinique, the difference probably would have been from fifty to two hundred per cent.

Q. Do you remember what Veronique sold for?

A. I do distinctly, \$1225.00.

Q. And what in your opinion would she have brought had she been in reasonably fit condition at that time and place?

A. From fifteen to twenty five hundred dollars.

Q. Now the dam Cornelia Bell, did you notice her also at that time?

A. Yes sir.

Q. What in your opinion would be the difference in that case?

A. Well I remember a hundred to a hundred and fifty dollars.

Q. Do you remember any of the other horses?

A. I remember a lot of the other horses, I remember them in my mind, but I could not identify them by their names, if their breeding was read over to me I could tell and place some of them.

Q. Easter Bell?

A. Yes, I remember Easter Bell.

Q. What in your opinion would have been the difference in value in her case if she had been in reasonably fit condition?

A. Anywhere from a hundred and fifty to two hundred dollars.

Q. Now a horse call- Woodford Bell?

A. I could not place him.

Q. He is by Alberton?

A. I could not place him.

125 Q. Do you remember a mare by the name of Bell Martin
by Council?

A. I have a slight recollection but I would not pass any opinion
now.

Q. Do you remember a black filly by Cressis?

A. What is the dam of that one?

A. Dam Woodford Bell by Alberton?

A. Yes, I remember that mare.

Q. What would you say about that filly in regards to the question
I have already asked you, what would be the difference in market
value?

A. A couple of hundred dollars, two hundred and fifty dollars.

Q. I call your attention to a brown colt by Red Tell? do you re-
member that colt?

A. It might have made no difference, or it might have made a
difference of fifty or a hundred dollars, I remember that colt on ac-
count of his size.

Mr. PATTON: You say it would make a difference?

A. It might have made a difference and it might not.

Mr. SALZENSTEIN: A bay filly by Red Bell, Bell Hart, Red Mar-
tin?

A. I cannot place him, no sir.

Q. Do you remember that?

A. No, sir, I don't remember it.

Q. There was a brown colt by Torgantic by Simons, dam Easter
Bell?

A. I remember him.

Q. What do you say in that case?

A. In that colt it might have made a difference of a hundred
dollars. I am satisfied if he could have shown.

A. A brown filly by Torgantic?

A. I remember her sir.

Q. What would you say in that case?

126 A. The same thing.

Q. Now a horse Red Star by Beausant by Bow Belle, Dam
Reply by Princeton, do you remember that animal, what would you
say in that case?

A. Well, I would say it would make no difference the condition he
was in.

Q. Do you remember a mare by the name of Bertha Ceaven by
Guy Corbitt by Guy Wilkes, dam Isabel by Aladdin?

A. No, sir, I don't remember her.

Q. Now you might tell the jury how this sale was conducted in
regard to these horses that you have mentioned.

A. That is the manner in which they were shown before the pub-
lie when they are sold &c. is that what you mean, the majority of the
horses sold at Madison Square Garden are sold purely upon what they

can show, the breeding shows for it-self, and the value is in what they can show, we put what we call a biting harness on, light harness with a long set of lines. I ride a horse and drive them ahead of me, ninety per cent of the horses are shown that way in the track that is the eighth of a mile in circumference, they have it laid out in the same way that a half mile track is with short turns and long stretches, and outside of the breeding the value of the horse and what he brings is what he shows?

Q. Now take this consignment, were they shown?

A. Every one of them.

Q. In the regular manner?

A. Yes sir, every one in the manner I have described.

Q. In the manner of being cried for sale was there any difference between these horses and the others sold there?

A. None whatever sir.

Witness on cross-examination in answer to interrogatories propounded by WILLIAM L. PATTON, Esq., testified as follows to-wit:

127 Q. Now Mr. Thomas, as I recollect, I don't know much about the horse business, as I recollect you said that horses standing in a car for a long ways deteriorate rapidly, that that hurt them?

A. After a certain time in transit, yes sir.

Q. Well is it not true that a careful horse shipper does not load his horses until just immediately or shortly before the train leaves because the wait prior to the shipment is bad on them?

A. I will answer by saying we have not got control of what time to ship them, we have to be governed by the time and place, the railroad companies rule that.

Q. But that is not what I asked you?

A. We try to load them as near as possible to the time they move the train as the railroad company will allow it so as not to have them stand any longer, yes of course.

Q. And if horses are loaded along about four o'clock in the afternoon and stand from then until about eight o'clock at night they would start off under a handicap on account of the loading is that it?

A. Hardly ever.

Q. You think that would not hurt them?

A. Hardly ever.

Q. And I don't quite understand about the stop, the intervening stop you said something about an intervening stop, if they were long or short, which is it?

A. My idea what I was trying to impress is this, a horse that has been in transit twelve or thirteen hours and then they had a stop for a long time, they would become more uneasy than if they were going, for instance they would move a few miles in transit understand and then had a short stop and start again and so on all the way along, that would be better than stopping them altogether and letting them stand still.

Q. That is, the motion of the train is better?

128 A. Yes, the motion of the train is better than standing still.

Q. Now in speaking of the values of the horses, you never saw any of these horses until you saw them in New York did you?

A. No sir.

Q. What kind of horses they were and what their action was and capabilities and all that sort of thing you don't know only simply from what Mr. Kirby told you, and their breeding?

A. Their breeding and what somebody has told me that had been to see them before they were shipped.

Q. You have not a single item of information of your own knowledge as to what those horses were like when they left Springfield?

A. Only as far as their speed abilities were concerned.

Q. That is a question of record, you take that from the record?

A. No, I beg your pardon, there was only one horse in this lot that had a record.

Q. What did you know of your own knowledge of their speed abilities before you saw them?

A. I will answer this question in reference to horses, I buy horses to campaign upon the grand circuit to trot myself, two animals in particular I had sent a gentleman here to see them with a view of buying them.

Q. But what I ask you is you had not individually yourself with your own eyes seen any of the performance of any of these horses?

A. Oh, no.

Q. Your basis of valuation is upon what somebody has told you about them and their breeding?

A. And their breeding.

Q. Now why is it that, take for example Lou Blake, you say that if she had been in reasonably good condition she would have brought from twenty five to thirty five hundred dollars?

A. Yes sir.

129 Q. That is based on what somebody told you about what Lou Balke's performances had been, and what her action was and what her condition was when she left Springfield?

A. And what her earning capacity would be in the future.

Q. That is purely speculative?

A. Purely speculative but what she was eligible to.

Q. A large portion of this valuation you put on these horses is purely speculative as to how they might turn out as an investment?

A. Yes, the same as you make any investment of property, corn or anything else.

Q. The investment proposition with a race horse is what stakes they can win?

A. Yes sir.

Q. So that the valuation you put on these horses is based on their ability to win stakes in races?

A. In a manner yes and what they are worth for breeding purposes for high breeding.

Q. Breeding purposes comes about after they have lost usefulness on the track as a general proposition?

A. No sir, not general.

Q. So that the valuation of twenty five to thirty five hundred dollars on Lou Blake is put on her primarily, not primarily, but one element is her ability to win money in a horse race, and secondly her ability to breed good colts, that is what the basis of valuation is; now how is it that you make such a wide range in giving your estimate of what her value would have been had she been in reasonable condition, you say from twenty five to thirty five hundred dollars, a difference of a thousand dollars.

A. Yes sir.

Q. What is the range, what occasioned this?

A. The reason is this, I answer within my own judgment, because I was going to pay twenty-five hundred dollars for her myself.

130 ———: Now I move to exclude the testimony of this gentleman on the ground that his basis of valuation is based on the offering price he intended to make on the question of Lou Blake.

The COURT: I would not allow him to give that in chief, and you can disclaim it if you want to.

Mr. PATTON: I will disclaim it and ask that the jury be instructed not to consider it.

The COURT: Gentlemen of the jury, the answer of this witness that he himself would have given twenty five hundred dollars for this mare, that answer is disclaimed by the attorney to whom it was made in response to his question on cross examination and the Court instructs you that you are not to consider that as evidence in the case.

Q. Aside from any personal consideration of desiring to purchase this horse, how do you explain that wide range between twenty five hundred and thirty five hundred dollars range of a thousand dollars in value of one individual?

A. Knowing well the market the number of years I have been there and knowing there are other people besides myself buying horses I have tried to buy horses that I tried to buy at twenty five hundred and gave seventy five hundred for them before I bought them because others wanted them also.

Q. So that the valuation of these animals was speculative on the kind of people and bidders that happened to be at this sale?

A. It wasn't speculative because you have struck out what I have stated because I know what I was going to bid myself, I am positive I had one bidder you understand.

Q. Now I disclaim that.

The COURT: Let it be stricken out.

Q. The condition governing the price of these horses were speculative on the people who happened to be at that particular sale on the days they happened to be put up, is that the idea?

131 A. Every horse that is sold is a speculation for the simple reason there is no price attached to them and the highest bidder gets them invariably, every one of them would be a speculation, every horse sold there, there is to price attached to them at all.

Q. So it arises out of this thing, the prices and variations of prices arise out of the competitive bidding at this particular sale?

A. That is it exactly sir.

Q. And these horses have no regular market value?

A. Oh, yes they have a market value, for instance I come here to buy that animal and know her, what they ask for her before she left here, she has got a market value.

Q. That is an asking value, is there a market value for this class of horses in the same way there is a market value for draft horses?

A. Most assuredly there is.

Q. Then what was the market value irrespective of this particular sale?

A. Twenty five hundred dollars.

Q. Not thirty five hundred dollars?

A. Twenty five hundred dollars because I know that was the market value.

Q. Where was there any market, open market for horses of that character?

A. You could ship them to any market in the world if you had that kind of horses and I will assure you of a dozen people that would have been there to have bought it, myself included, you could have put her in a sale stable here and said she was to be sold there or for sale.

Q. Is there any difference in the market value of that class of stock in Springfield and New York?

A. Not any difference, only the aggregate and lot of people that go to a central point to get those horses instead of going to where they have only one horse to buy, you have a chance to buy eleven hundred of that same class of horses.

132 Q. Does not that fact that there are a large number of horses in competition in the sale have a tendency to reduce the value of the horses?

A. It has a tendency to enhance the value of the horses.

Q. Because more opportunity to buy more horses?

A. Because you have got more opportunities of more buyers generally they will buy more horses, gentlemen that will buy horses and pay up to ten thousand would not come from Wall street New York to Springfield to look at it, consequently they come there.

Q. Then the prices at the Madison Square Garden are prices that are made or depend largely on the fact that there are eligible purchasers at that particular point at that particular time is that it?

A. Yes sir.

Q. And that they will pay higher prices for animals than you can get down in the country?

A. No, that would not cover the point, it means that they get more people to bid upon those horses and when there is two or three or five or ten people want the same horse you will get more for them than if you only had one man.

Q. Then it resolves itself into this, there is a competition between bidders?

A. Yes sir.

Q. And it raises the price of the animal, is that it?

A. It raises it in that way yes sir.

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Q. Now this Rythmic Bel horse?

A. Yes sir.

Q. You say in condition he would have brought three to four thousand dollars.

A. Yes sir.

Q. Well, in Rythmic Bel you make a range of his value from three to four thousand dollars?

A. Yes sir.

Q. Is that the same basis on which you gave the range of
133 value to Lou Blake?

A. Exactly.

Q. And so on down through these horses described?

A. Yes sir.

Q. Now did the stake winning proposition effect the value of those horses that were in that class of horses, how many of them were horses whose value was affected in that way?

A. That could have been entered in stakes, all these younger horses would have been, could have been probably, but breeding cut a material figure in regard to the first value of the horses, taking the case of Rythmic Bel you will get into the breeding line, if you follow that up and if you get a dam say from—

A. No, I don't want to know anything about that?

A. Well that is the end of it, that is one reason why I state the price, a yearling is a yearling, but one I would give thirty five hundred for it if it just could walk and I didn't see it further at all, and the other one I would not offer a hundred dollars for, both being as good individually to look at as the other.

Q. On account of their breeding?

A. On account of their ancestors, yes sir, I would give thirty five hundred dollars for a sucking colt and offer others a hundred dollars and both bred as standard horses.

Q. I understand you to say as to these horses you have only the word of somebody else as to what they were when they were in Springfield?

A. When they left here, yes that is all.

Q. And your basis of valuation is upon that basis?

A. Our basis of valuation is upon what is their breeding and what they had done here that an expert had seen and reported to me and what they would show down there to satisfy me, I was paying the money, consequently had they shown what the report was here

I could have told you nearly what they would have brought
134 as far as I am concerned, somebody else might have gone further, but knowing the market as well as I do in that time, well within reason, I want to be reasonable, I think you would be surprised if I would say ten thousand for Rythmic Bel, I know you would.

Q. I have been surprised all the way through.

A. Well that may be.

Mr. SALZENSTEIN: You speak of ten thousand for Rythmic Bel you predicate that on what you have seen and know and what transpired subsequently?

A. I will answer that by saying I was mistaken that I did not buy him that is all, I should have bought him even in that condition and taken may be a little more speculative chance.

Mr. PATTON: Then he was worth more money in that condition that he brought?

A. No.

Q. You say you made a mistake in not buying him at more money?

A. For the simple reason he recovered after a long rest and a lot of care you understand and the next year and came out and done something.

Q. Then according to your view he was worth more money at the time he was sold than he brought?

A. No, he wasn't worth more money because he didn't bring any more.

Q. Your idea is he was worth what he brought?

A. What he brought in that condition.

Q. Any horse is worth at any of these sales what he brings?

A. In the condition and the way he shows yes sir.

Q. An entirely speculative market?

A. I stated that before yes sir.

Mr. SALZENSTEIN: When Mr. Patton speaks of a speculative market what do you understand by the term speculative?

A. Well you speculate, I go and buy foals to win money, that is

I bid a hundred dollars and win a thousand. I buy a piece
135 of property for seven thousand dollars that somebody gives
me fifteen thousand for in two weeks, that is speculative, I
give what the market value is at the time and sell it for what I can
get.

Q. When you speak of speculation you mean the possibilities that
these animals might afterwards achieve?

A. Certainly.

Q. Taking these animals at the condition, place and time did they
have a market value?

A. They had a market value the market I claim is what they bring,
that is their market value.

Q. What made these animals, what is it that enters into the mind
of the buyer in bidding on them, what is it?

A. First of all was their breeding, second of all is their soundness
and individuality, further more than that is what they can show we
are buying them for trotters or pacers and consequently we want to
bring them there in condition to show their gait, there is various gaits
and one horse is similar bred to the other you would have one you
would give a thousand for and another ten which is out of gait.

Q. Take the mare Lou Blake which has been mentioned, what
would make that animal desirable and cause people to bid on her had
she been in reasonably good condition at that sale at that date?

A. She not only was eligible to stakes but actually entered and
paid up according to the book in something like thirty seven or forty
thousand dollars' worth of stakes, making her eligible to them and

possible chances of winning a portion of them or a portion of that money, she had already shown good records.

Objection by defendant to the testimony of her being entered with a possibility of winning as an element of her value, it being wholly a gambling transaction and not a part of the legal valuation of a horse or any other piece of property.

136 Mr. GRAHAM: Mr. Patton brought it out on cross examination as one of the elements of value, and the answer to the question was that she was eligible to winning stakes, we have a right to find out what they mean, what value it might be.

Mr. PATTON: If it turns out that element of value is an element of which the law has no right to take cognizance we have a right to object.

Mr. GRAHAM: Winning a stake at a race is not gambling.

The COURT: It depends on circumstances, if in the form of a premium it is not gambling.

Mr. GRAHAM: We are bound to put the most favorable meaning on the use of it, every stake here at the State Fair is a stake.

The COURT: Well the objection is overruled.

To which ruling of the Court the defendant by its counsel then and there excepted.

Mr. SALZENSTEIN: You have mentioned one of the things that made Lou Blake desirable was her entry?

A. Well, the other reason her value would be decreased danger was she might not live twelve hours.

Q. In her then condition, now you said something about a record she had?

A. I said the record that she had obtained here as a two year old you understand every horse man in the United States had knowledge she was eligible to those stakes had she come then in reasonable condition she would have brought the amount of money I have mentioned or more.

Q. You speak about a large number of buyers being present at this sale for the purpose of purchasing horses, are there any more classes of horses more desirable than others and would create a greater competition?

A. Yes sir.

Q. What kind?

A. Pure bred horses are certainly more competitive, more possibilities of winning stakes and eligible and that show the speed that would draw attention to the animal as being a factor in these stakes which would be another.

Q. Well take these horses you have named, Lou Blake, Rythmic Bel, Veronique and Cornelie Bel, what would you say as to them?

A. Well Cornelie Bel she was sold apparently as brood mare.

Q. Well take the others then?

A. The others would be all for trotting purposes, understand Cornelie Bel might be bought for somebody to race, there is people

who buy to put them on to race apparently and then for breeding purposes also.

Q. The question I asked you, what I was directing your mind to was whether or not this class of horses was such a class of horses as would lead to considerable competition?

A. Lead to competition by the best buyers in the United States, buyers of that class of horses.

Q. Why?

A. On account of the breeding and again with the possibilities for using them for trotting purposes.

Q. How many kinds of horses are shown at that sale or anywhere else?

A. Oh, they sell ninety per cent of the horses are trotting horses, well bred horses, they do get some horses, well kept, most of the animals are of the same head, that are carriage horses.

Q. But all of this kind?

A. All of this kind.

Q. Are some more desirable than others?

A. Yes sir.

Q. What makes them more desirable?

A. Their breeding, possibilities of winning and what they show there and then.

Q. Now then compare the majority of horses a large majority of horses shown at that sale at that time where would you place the fellows I have named, Lou Blake, Rythmic Bel, Veronique as to their desirability?

138 A. Why their breeding was par excellent, what we call par excellence in the producing line, right on top, by sires and out of mares the best the United States today has got, consequently they would be more desirable than some got by some other stallion that might be equally as good but ain't known, has not produced anything.

CHARLES A. NILES being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows to-wit:

Q. State your name to the jury?

A. Charles A. Niles.

Q. Where do you live?

A. Terre Haute, Indiana.

Q. What is your business?

A. I am what is called a horse merchant.

Q. Define to the jury what that business is?

A. It is buying and selling horses as well as training and developing speed.

Q. What kind of horses mostly do you handle?

A. Invariably trotters and pacers and stock colts.

Q. How long have you been in that business?

A. Well, virtually all my life.

Q. What is your age now?

A. 53 years old.

Q. What experience have you had in shipping that class of horses for long distances?

A. Well, I have made some very long shipments, for instance from Minnesota to Philadelphia and the like of that, Boston and New York.

Q. A thousand miles or more?

A. Oh, yes.

Q. Also shipped to New York?
139 A. Well I never shipped but one horse to New York for a sale but I have shipped there for racing purposes.

Q. You are familiar then with the effect on horses of long shipments?

A. Oh, yes, I think so, yes.

Q. What is the effect on that class of stock in long shipments by freight?

A. Well, in what way do you mean?

A. I mean in length of time?

A. Well, if it is a great length of time I always manage to have them unloaded and rest if it is a possible thing.

Q. What effect has a long continuous trip of four or five days on horses of that sort, four and five days and night?

A. Well, it is very detrimental if they are not in a way to ship as quick and as fast as possible, what I mean by that is any delay by the cars standing still and other trains passing them is very annoying to a car load of horses.

Q. What effect has it on the horses?

A. Well, of course it has different effects on different horses.

Q. This class of stock?

A. It makes them very restless to stand long at any one particular place.

Q. Taking a shipment of fourteen head of horses, of high bred trotting horses, race horses, loaded on the cars at Springfield a little after four o'clock on the afternoon of January 26th 1903, thence taken about one o'clock by train to Joliet where they arrived about six o'clock in the morning and were kept in the yard at Joliet until about three o'clock and taken then to Lake a distance of some forty or fifty miles and taken by train from Lake between twelve and two o'clock, on the morning of the 26th then by degrees to New York, stopping at various places at some of them six and seven hours at a number of places in which this car load was contained, being jostled

about by reason of some of the cars needed being iced, the 140 cars being taken forward under the shoot, and reaching New

York only on the morning of the 29th of January, what effect would you say such shipments would have on these horses, what effect in your opinion?

A. Well, in the first place I would call it a very bad ship.

Objected to by defendant. Objection sustained by the Court and the answer excluded.

Q. What effect in your opinion would it have on the horses?

A. What effect in what way?

A. Upon their condition, physical condition?
A. Why it would have a very detrimental effect.

Q. In what way?

A. In the way of their being by standing and by the constant jerk of the engine and the air brake, the horses are tied by their head and they get this jerk, it very much sores them in the shoulders on account of their being tied up by the head.

Objection by defendant to making this matter a matter for hypothetical questions and answers thereto, there is evidence as to the actual things that took place from men who were present and as to the actual condition of the horses when they arrived it seems to me it is going too far to put it to an expert as to what was done under hypothetical circumstances.

The COURT: The actual testimony is that these horses that were on this journey something like four or five days and it is proper I think to prove by experts the difference that would be in conditions between a shorter transit and this longer one.

Mr. PATTON: But this witness has testified as to what would be the effect of the long transit.

The COURT: I suppose that is really put in as preliminary to getting the difference between the two, I take it that is the purpose, if it is not for that purpose I would be inclined to agree with your proposition so far as he has gone at least up to this time, that the 141 actual condition of these horses is established by the men who accompanied them, but what would have been their condition if they had been shipped say thirty hours faster is a matter he must determine as far as he can show.

Mr. PATTON: That is not the point of objection.

Mr. SALZENSTEIN: I am leading up to that, and in addition the Court held this morning on a question by Mr. Patton we could not show the actual occurrences by those witnesses on those things.

The COURT: The purpose of proving the difference in condition can only be done by hypothetical question and may be done in that way.

To which ruling of the Court the defendant by its counsel then and there excepted.

Q. What would be the difference in condition of any had those horses been shipped to reach New York on a train which got there at eight o'clock Saturday evening, that is on the evening of the 27th as against the time that I have mentioned in the morning between six and eight of Monday the 29th of January with this class of stock I mentioned in the question, what would be in the condition of the horses in your opinion?

A. Well there would be a great difference.

Q. In what way?

A. In this way, if I may be allowed to explain, that is the ear is moved and the horses are jerked continually we will say two or three times a day at different places, they naturally will warm up, when they get to running there ain't no ear you can get that will keep the draught from these horses, but what they will take cold.

otherwise if they had been going along necessarily they don't get warm by shipping therefore there is no danger or not much danger of their taking cold and having what we call pneumonia at the end.

Q. How about that sore feeling you have spoken of, tired sore feeling?

A. That we seldom see if a car is in transit most of the time and isn't jostled around.

Q. How long does it take to put horses in good condition
142 that have been subjected to this treatment and being on the road the length of time I mentioned in the first question, that is from about 4 P. M. on the 25th until six or eight P. M. on the morning of the 29th?

Objected to by defendant as immaterial how long it takes to put horses in good condition?

A. I will add to it then to cover any objection, so that they may be shown and exhibited at a public sale where they are required to move and be in a reasonably fit condition for that purpose?

Objected to by defendant as immaterial and no notice shown or alleged to this defendant railroad company of any necessity of putting horses in condition.

The COURT: My notion is the wiser way to proceed is to proceed on the proposition that the sale was at a certain time, that the horses got there at a certain time, you could do what you did do with them in the meantime, and put them on the market in such condition as they were, and the difference in value; I have allowed you to show between the condition they were when put upon sale and in which they arrived as proper to go to the jury, if you go into the question of how long it would take to put them into condition for this particular sale then you get into that very difficulty we first run into if they should miss this sale, the question would be whether the damages was missing this sale, and all that. The objection is sustained.

Q. Mr. Niles, were you present at the sale of these horses at Madison Square Garden?

A. This particular sale?

A. Yes?

A. Yes sir.

Q. If you had previous to that time a familiarity with the market price there or elsewhere of this class of horses?

A. Yes sir I have attended those sales.

Q. How long have you been attending those sales?

A. O, I could not hardly say, I expect eight or ten years.

143 Q. Do you remember any of these horses by name in Mr. Kirby's shipment?

A. Yes, I remember a few of them, yes.

Q. Take the mare named Lou Blake, do you remember her?

A. Yes, I remember her, drove her, it is a filly.

Q. What in your opinion at that time and place was her fair market value had she been in a reasonably good condition?

A. Well, there is a good many ways that I could answer that.

The COURT: Just answer in dollars and cents.

Q. What was her fair market value at that time and place if she had been in reasonably fair condition?

A. I would say three thousand dollars.

Q. What was her condition?

A. She was in very bad shape.

Q. Tell in what way?

A. Can I tell when I first saw her?

Q. Tell all you want to, when you first saw her if you did see her before that time anywhere?

A. I saw her about 11 o'clock the night before the day she was going to sell, she was then very uneasy and restless and I thought quite a sick filly, so much so that she labored in breathing and was as I say very uneasy, walking around her stall and seemed to be in quite a bit of distress, in a smothering way, like she was troubled with some lung trouble.

Q. What was her condition on the next day?

A. The next day I saw her about half past nine I think, and her condition was as far I could see about the same.

Q. And at the time she was sold what was her condition?

A. At the time she was sold I could not see any improvement.

Q. Do you remember the horse called Rhythmic Bel?

A. Yes sir.

Q. Do you know in what condition he was at that sale?

A. Well, his condition was similar to the others, to this filly Lou Blake, only I don't think he was quite so bad, wasn't quite so sick.

144 Q. Had he been in reasonably good condition what was his fair market value at that time and place?

A. I would say thirty five hundred dollars.

Q. Are you familiar with Cornelia Bel, mare called Cornelia Bel?

A. Yes, I have raced with her a number of times.

Q. What was her condition at that sale?

A. Well, I didn't pay so much attention to her because I wasn't in a measure interested in her like I was the filly and the colt, she wasn't sick, but with a kind of stock, so I didn't pay very much attention to her.

Q. So you don't know exactly what her condition was?

A. I took notice of her in a friendly way because I always admired the mare, I took notice she was sick and seemed to be worn out.

Q. Now had she been in reasonably fair condition at that sale what would you say was her fair market value at that time and place?

A. Well, the way other mares sold that had records there I should say that she was worth three thousand dollars.

Q. That was her fair market value?

A. That would be her fair market value I would think.

Q. Now do you remember a mare by the name of Veronique?

A. I don't remember so much about that mare, no sir, only in a casual way that is all.

Q. Do you know what condition she was in?

A. She was in about the same condition of the others so far as I could see.

Q. Now had this mare been in a reasonably fair condition what was her fair market value at that time and place?

A. I am not familiar enough with that mare to give an intelligent answer to that question, because I wasn't well enough posted on the mare to pass my opinion in a reasonable way.

145 Q. Now were there any other animals in that consignment that you were familiar enough with, are familiar enough with to tell us what they would have brought if in a reasonably fit condition at that time and place?

A. No sir, I don't think I was familiar enough with the balance of that lot to give an intelligent answer to those questions.

Q. You said something about paying particular attention to several of these horses, was there any reason for so doing?

A. Yes sir.

Q. What was that reason?

A. I selected the ones, well, Lou Blake in particular for one I saw her trot a race and win out here myself and in fact I raced a horse that afternoon myself, but not in her class.

Q. Here at Springfield.

A. Here at Springfield, yes sir, as a two year old.

Q. Any other horse?

A. Well, not that I would trot a race, no colt, except the old mare Cornelius Bel.

Q. Did you have in mind or contemplate making a purchase of any of these animals yourself at that time?

A. Yes sir.

Q. What was it?

A. Lou Blake and Rythmie Bel.

Objection by defendant to the testimony as to the contemplation of purchase by this gentleman, being no special circumstances averred that there was any special purchaser of any special animal.

The COURT: I am inclined to think the testimony may stand for the purpose of showing his attention was directed specially to these two, of course he has not stated and would not be allowed to state what he expected to give for them.

146 To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: Neither is it proper to show at a particular sale a particular purchaser was there desiring to buy, for that has no effect on the market value.

The COURT: I have not allowed it to go for that purpose, the only purpose for which it is admitted is tending to show why he paid attention to their condition, but not as an estimate of their market value.

Mr. SALZENSTEIN: Here are some depositions taken upon due notice under a commission issued by this court.

Mr. PATTON: I might say in regard to those depositions we have

a right to object to any and all questions, that was agreed to in taking the testimony.

Mr. SALZENSTEIN: Objections were interposed throughout the taking of this testimony.

Mr. PATTON: Some were and some not at the caption of the deposition defendant reserved the right to object to the testimony on the trial to the testimony taken under this deposition, in the caption of the deposition.

Mr. SALZENSTEIN: The caption shows the deposition of this witness, and after that the statement, "It is understood that the defendant reserves its right to object upon the trial to the testimony taken under this commission." The deposition is as follows:

H. M. FULLER, being duly sworn testified as follows:

Direct examination:

Q. What is your name, age and residence?

A. My name is Hiram M. Fuller. Sixty years of age. 157 W. 119th street. My business is manager of the export department of the Fiss, Doerr & Carroll Horse Co.

Q. How long have you been engaged in that business?

A. Six years.

Q. Do you know Nathaniel T. Kirby, the plaintiff in this action?

147 A. Yes sir. I have known him for the past two years.

Q. What do you know of the shipment of a car load of horses by Mr. Kirby consigned to Fasig-Tipton Company, New York, the latter part of January 1906?

A. I know that such a car arrived at our platform at 12:30 P. M. the 29th day of January 1906.

Q. What did you have to do with this shipment?

A. I have acted as agent for the New York Central Railroad receiving horses and delivering horses.

Q. I hand you a paper purporting to be the bill of lading and ask you if you know who put the memorandum on it in red ink?

A. Yes sir I did.

Q. That is, you made the memorandum on both the front and reverse side.

A. Yes sir. I made the red ink on both the front and reverse side.

Q. Will you explain under what circumstances you made these two memoranda?

A. At the request of Mr. Kirby.

Q. The car number described in this memorandum is correct?

A. Quite correct, yes sir.

Q. And the time of arrival was correct and the number of horses therein referred to was correct?

A. Yes.

Bill of lading marked Plaintiff's Exhibit "A." for identification.

Mr. PATTON: We object to this bill of lading as being wholly im-

material and incompetent, issued by the Michigan Central Railroad Company, and not by the Chicago & Alton and the defendant has no knowledge of it.

Mr. SALZENSTEIN: We just offer it to show the time of arrival and the number of horses and whose they were.

Mr. PATTON: If for any other purpose but for the time of arrival we object.

148 Said bill of lading so offered in evidence being in the words and figures to-wit:

PLAINTIFF'S EXHIBIT "A," FOR IDENTIFICATION. A. W.

New Form 386 10m o p co.

Michigan Central Railroad Co.

Uniform Live Stock Contract.

JOLIET STATION, Jan. 25, 1, '06.

This agreement, made this 25th day of Jan. 1 '06 by and between the Michigan Central Railroad Co., hereinafter called the carrier, and N. T. Kirby, hereinafter called the shipper:

Witnesseth: That said shipper has delivered to the said carrier Live Stock of the kind and number, and consigned and destined by said shipper as follows:

Consignee.	Destination, etc.	Number and description of stock, shipper's load and count.	Weight subject to correction.
Fasig-Tipton Co.	14 Horses.	20000
130 St. Sta. New York, N. Y.			
Advance Charges, \$—.			
Car. Nos. and Initials—6082 A P II Co.			

for transportation from Joliet Ill. to destination on the said carrier's line of railroad, otherwise to the place where said Live Stock is to be received by the connection carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions which are admitted and accepted by the said shipper as just and reasonable, viz:

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of per tariff * * * which is 149 the lower published tariff rate based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event whether the loss

or damage occur through the negligence of the said carrier or connecting carriers or their employés or otherwise.

If Horses or Mules—not exceeding One Hundred Dollars each.

If cattle or cows—not exceeding seventy-five dollars each.

If fat hogs or fat calves—not exceeding fifteen dollars each.

If sheep, lambs, stock hogs, stock calves or other small animals, not exceeding five dollars each.

And in no event shall the carrier's liability exceed \$1,200 upon any car load.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier, is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable, on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit: Overloading crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of water, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control.

Shipments of horses must in all cases be accompanied by an attendant to destination.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employés, or otherwise the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the

M. C. R. R. Agent of the said carrier at his office in Joliet, within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

151 That *whatever* the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their train or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid for the transportation of the live stock in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier, from all claims, liabilities, and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employés or otherwise.

And N. T. Kirby do hereby acknowledge that he had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad transportation companies and common carriers of the said Live Stock upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

152

THE MICH. CENT. RY. COMPANY,
By W. D. MOHR, *Station Agent.*

Witness my hand,

N. T. KIRBY, *Shipper,*
By — — —, *Shipper Agent.*

W. D. MOHR, *Witness.*

Release for Man or Men in Charge.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid on to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of

which live stock man is in charge, the undersigned does hereby voluntarily assume all risk of accident or damage to his person or property and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for — on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employés or otherwise.

N. T. KIRBY,
Signature of Man in Charge.

W. H. MOHR, *Witness.*

(At the close of the above in red ink the following words and figures)

14 Horses arrived in car #6082 A.P.H Co. 12.30 P. M. and delivered to Mr. Kirby. One horse sick.

H. M. FULLER.

(Across the face of the above written in red ink appears the following)

Car 6082 A. P. H. Co. 14 horses arrived at platform 12.30 P. M. Monday January 29, 1906 and delivered to Mr. N. T. Kirby
H. M. FULLER, *Act. Agent.*

Q. Mr. Fuller, will you state what the condition of those horses was at that time?

A. I did not notice anything out of the ordinary except 153 that one horse was sick and that we called a veterinary for the sick horse.

Q. Do you remember what veterinary it was?

A. I think it was Doctor McCully.

Q. You've had a great deal of experience in shipping horses the last six years have you not?

A. I have yes sir.

Q. Can you state what was the cause of the sickness of that one horse?

A. No sir.

Q. What kind of horses were these?

A. Well, I don't know particularly. They were trotting horses I suppose.

Q. They were not draft horses were they?

A. No.

Q. In your knowledge of horses would you state whether or not they were highly bred horses?

A. No sir. I would not say so. I don't know.

Q. Do you know what the freight charges on this shipment were?

MR. PATTON: I object to the testimony as to the amount of freight charges as incompetent immaterial and irrelevant.

THE COURT: I think I understand the situation, if I do the objection, for the time being at least is overruled, they claim a special contract with you to deliver their car in time to take this Michigan Horse car, they say you didn't do it and therefore they had to negotiate the best they could, and in that way it costs them more.

MR. PATTON: I make the objection on the basis of the former objection, that the basis of this contract is invalid and void.

THE COURT: Yes, I understand all that.

To which ruling of the court the defendant by its counsel then and there excepted.

A. Yes sir. I know just exactly what was paid in the first instance.

Q. What was paid in the first instance?

A. \$200.50.

Q. Who paid that?

A. Mr. Tipton paid that to me.

154 Q. State what you know regarding the payment of this freight?

A. I rendered the bill to Fasig-Tipton for \$200.50 for which I received payment. This car of horses was originally billed at 130th street. The car was rebilled from 130th street to my stable at 36th street. The charges for bringing that car down was \$16. That was deducted by instructions from Mr. Adams from Mr. Dutcher's office \$16 was taken off leaving a total amount of \$200.50. On June 8, 1906, I mailed a check to Mr. Kirby for \$10 as a refund of over-charges on freight charges.

Q. Who finally paid this bill?

A. Who paid the bill? the Fasig-Tipton Company.

Q. That is so far — you know?

A. Yes sir.

Q. Mr. Fuller, you testified that you shipped a great many horses across the water?

A. Yes sir.

By Mr. CARTER:

Q. In answer to Mr. Tanner's question in regard to shipping horses you stated that you had shipped horses across the water, have you shipped any horses by rail?

A. Across the water?

A. No, by rail?

A. Yes at times. Our office is the receiving office for N. Y. Central road.

HIRAM M. FULLER.

EDWARD A. TIPTON, being duly sworn, testified as follows:

Direct examination by Mr. TANNER:

Q. State your name, age, residence and occupation?

A. My name is Edward A. Tipton, I am 50 years old; reside at 231 West 97th street, New York City and am President of the Fasig-Tipton Company, horse auctioneers.

155 Q. How long have you been with the Fasig-Tipton Company?

A. Ever since it, the Company, was organized.

Q. How long ago was that?

A. That was about eight years ago.

Q. In what capacity have you been connected with that Company?

A. I was originally the secretary and treasurer and since then I have been the president.

Q. Explain generally the nature and extent of the business of the Fasig-Tipton Company?

A. We are auction brokers of live stock, specially horses and do business in New York, Boston, Cleveland, Ohio, Lexington, Ky., also Saratoga, N. Y., although we have no office there.

Q. What experience and knowledge have you had of the shipment of high bred stock, more particularly blooded stock?

A. We have handled—I have been in the business of handling high bred, thoroughbreds and trotters for a great many years, certainly 20 to 30 years.

Q. Have you had occasion frequently to ship such stock as thoroughbreds by rail?

A. I have had occasion to have them shipped. I never have been along with them, have had them shipped, thousands of them.

Q. Have you had occasion to observe the effect of long transportation on stock of this kind?

A. I don't know that I have in a way, because I have been at the head of the concern and have not been in the stables. I know the general effect.

Q. You know the general effect in the course of your 20 or 30 years' experience, you have had the occasion to observe the effect of a long travel by rail?

A. Yes sir I have.

Q. What is the effect of such transportation?

Objected to by defendant as immaterial, irrelevant and incompetent.

The COURT: For the purpose of comparing the condition of these horses at the time they would have arrived by a shorter shipment and a longer shipment I think it is competent, for any other purpose it is incompetent, nor is there anything in there—

Mr. SALZENSTEIN: He says the great trouble I have found in shipping horses if this, is the laying them up on the road any length of time.

Mr. PATTON: The very thing we are objecting to and as we objected to it before.

The COURT: I am of opinion a portion is competent, that which is incompetent it seems to me to be harmless, it is very hard to separate it, for instance long transportation is much harder on them than a short one, that is competent, and it tires them very much more than it does to come right through. I am of opinion

that is competent, there is mixed up with it a lot of stuff about horses and men, it don't serve them all alike, that probably is harmless, I am rather disposed to overrule the objection and let it be read.

To which ruling of the Court the defendant by its counsel then and there excepted.

Mr. PATTON: Let it be understood that all questions and answers are objected to down to the question "Did you have any correspondence or dealing with Mr. Kirby regarding the consignment of a car load of horses to your firm for the Madison Square Garden sale in New York commencing Monday January 29th, 1906" On the same ground I have made the objection so far as to the expert evidence on the effect of transportation.

Objection overruled by the Court: To which ruling of the Court the defendant by its counsel then and there excepted.

A. Well, it is different on different horses, just like it is on men. Now some horses ship badly and others it doesn't seem to affect at all. Of course a long transportation is much harder than a short time.

157 Q. I am referring now to blooded horses, high bred horses?

A. The great trouble I have found in shipping horses is this, is the laying them up on the road any length of time.

Q. What effect does that have?

A. It tires them very much more than it does to come right through.

Q. The effect on high bred horses is much more marked than on common horses, is it not?

A. I never handle any common horses, never shipped any, always deal in high bred market, was raised in it.

Counsel for defendant stated that it is understood that all these questions are subject to the same objections.

Q. Is it not true that shippers of high bred horses make a great point of having the shipment as short as possible?

A. Yes sir.

Q. Isn't this especially true if they are to be sold at the end of the shipment?

A. Yes sir.

Q. And the longer they are on the road; the worse it is for them?

A. The worse it is for them, they get very tired and don't show the advantage.

Q. Are you acquainted with the plaintiff in this action, Mr. Kirby?

A. Yes sir.

Q. How long have you known him?

A. I have known Mr. Kirby 12 to 15 years.

Q. Did you have any correspondence or dealing with Mr. Kirby regarding the consignment of a car load of horses to your firm for

the Madison Square Garden sale in New York commencing Monday 29th, 1906?

A. That correspondence was conducted by Mr. Tranter, who is here with me the manager of our trotting department.

158 Q. That correspondence eventually passed through your hands?

A. No sir, it did not pass through my hands, it was a very heavy correspondence.

Q. Have you ever seen that correspondence?

A. I couldn't swear that I had, I have seen part of it since the sale, not before. I have had correspondence since the sale with Mr. Kirby, but I wouldn't say I had seen it before that.

Q. Have you heard the previous witness, Mr. Fuller, testify?

A. Yes sir.

Q. Do you know anything about the shipment of horses referred to by him?

A. I know about the horses about the consignment.

Q. That is the same consignment?

A. Yes sir.

Q. There was only one consignment from Mr. Kirby during January 1906?

A. That is all. One consignment of one car load.

Q. State generally what you did regarding this consignment Mr. Tipton?

A. Well, the consignment of horses came into our place, to the best of my recollection, late Tuesday afternoon, to be sold Wednesday afternoon.

Objection by defendant to that portion of the answer "to be sold Wednesday afternoon" there being no allegation in the declaration or proof that there was notice given to this carrier that the horses were to be sold on any particular day, which is an element of special damage and must be averred and proven. Objection overruled by the Court. To which ruling of the Court the defendant then and there excepted.

Q. Do you remember what dates these were?

A. Yes, they were to be sold January 31, and were received by us on the afternoon of Tuesday, January 30th.

Q. How many horses were there in that consignment?

A. I don't remember, Mr. Tranter has charge of that.

159 Q. What time in the afternoon of the 30th did you receive these horses?

A. To the best of my recollection between four and five o'clock.

Q. What time did the sale start?

A. I am speaking altogether from memory, I think the sale began about two o'clock in the afternoon.

Q. State as fully as you can what the condition of these horses was?

Counsel for defendant states that formal objection is made to that on the ground that it is immaterial, irrelevant and incompetent and that witness is not qualified to speak. Objection renewed by

defendant. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. There were several of them, several not in saleable condition, like Kirby always sends his horses. I saw those horses.

Counsel for defendant objects and moves to strike out the words "like Mr. Kirby alway sends" Motion to strike out sustained by the Court and the words objected to stricken.

A. Then there was one mare that was shipped that was quite sick and she was sold as a sick horse, without warranty of any kind.

Q. If a horse is not in saleable condition, do you usually sell without a warranty?

Objected to by defendant as immaterial, irrelevant and incompetent.

Objection sustained by the Court.

Q. What did you mean when you said without warranty of any kind?

Objection by defendant to what they usually do. Objection sustained by the Court, the Court remarking because it is testified to here this mare was sold without warranty.

160 A. Yes, subject to veterinary inspection.

Same objection to all questions.

Q. Not referring to this one sick horse but to the others you mentioned as being in an unsaleable condition, how many were there exclusive of the one horse just mentioned?

A. I couldn't say positively, there must have been three or four more, I couldn't say positively.

Q. Can you state from your experience what was the matter with the one horse which you mentioned being sick?

A. No sir, I am not a veterinary, I don't know.

Q. From your experience could you say whether a shipment of four days and five nights by rail would produce the condition you observed in that horse?

Objected to as immaterial, irrelevant and incompetent. Witness not qualified to answer.

The COURT: Gentlemen of the jury, the court is of the opinion the answer ought not to be read because this man is not a veterinary surgeon or knows anything about the diseases of horses and things of that kind. The objection is sustained on the ground the man has not shown himself competent to answer.

Q. What effect, if any, would a delay of 24 hours or more have on those horses in reaching New York by rail for the Madison Square Garden sale, what effect would it have on the market price of them?

Objected to by defendant as immaterial, irrelevant and incompetent.

Witness not qualified to speak, purely speculative nature, no evidence as to the condition the horses were shipped in.

Mr. PATTON: We insist upon that objection.

The COURT: It depends upon what he says later whether is he competent to answer or not. Well I am inclined to think the answer discloses nothing of any value. The objection is sustained.

161 Q. Will you please explain fully how horses are entered, handled and sold at the Madison Square Garden sales explaining the numbering of each horse, description in the catalogue and anything else therein contained regarding the conduct of the sale?

Objected to as immaterial, irrelevant and incompetent.

The COURT: The objection is overruled, I am allowing this testimony to go in to show the character of the sale, as tending to throw what light it will as to whether they brought market value and all that. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Every horse is entered in writing with his pedigree, his description, his performances given, with the pedigree and all facts and we have them printed and numbered in the catalogue, just like all catalogues. The horses are brought before the stand and exhibited to the public, showing their condition and if they are harness horses, their way of going, manner &c. and they are then put up for auction and then sold, shown to the public and then sold.

Q. How long before the day advertised for the sale of the horses are they shown to the public?

Objected to by defendant.

The COURT: The objection is sustained, I am of opinion from the point where you stopped down to where he begins to speak about this \$29.00 of freight, I am of opinion it ought to be excluded, previous sales made for Mr. Kirby and correspondence with Mr. Kirby and all that ought to be excluded, from the point objection is made, all that I think as I understand this case ought not to go in.

Q. What do you know about freight charges on the car in which these horses were? I am referring now to the last consignment of

January 1906?

162 A. I know that Mr. Fuller representing the New York Central Railroad collected from us \$200.50 and that the same was charged to Mr. Kirby.

Q. Have you the bills in this last case?

A. The bills of lading?

Q. The bills for the freight?

A. No, they were sent back to Mr. Kirby. Always are, I suppose they were.

Cross-examination by Mr. CLEMENT:

Mr. PATTON: There is some cross examination here in regard to matter that has been excluded.

The COURT: You can leave that out if you want to, if you read

the cross examination as to the excluded matter we will have to read the excluded matter; I will give you leave to withdraw so much of the cross examination as pertains to any part that has been excluded.

Q. Did you see those horses at any time before they were received in New York?

A. I did not. I never saw them until they came into our place.

Q. Who delivered them in your place?

A. I have forgotten, from memory would say we sent for them ourselves.

Q. To what place did you send for them?

A. Fiss, Doerr & Carroll Horse Co., export stables, agents for the New York Central.

Q. Do you know what time Fiss, Doerr & Carroll received these horses?

A. I do not.

Mr. PATTON: Now here is the redirect examination.

The COURT: I am of opinion that ought to be excluded, all of the redirect.

163 Mr. PATTON: And the re-cross examination is withdrawn.

Mr. SALZENSTEIN: I suppose we want it in.

Mr. PATTON: I don't care about it, if you want to read it go ahead subject to such objection as we may make.

Mr. SALZENSTEIN: We want the following:—

Q. These horses were received by you on Tuesday?

A. Yes, Tuesday afternoon, late.

Q. For this sale in Madison Square Garden?

A. Yes sir.

Q. The sale running Monday, Tuesday, Wednesday and Thursday?

A. Yes sir.

Redirect examination.

Q. The horses shipped by Mr. Kirby were to be sold on Wednesday?

Objected to by defendant as wholly immaterial and incompetent.

Mr. SALZENSTEIN: This relates entirely to when these horses were to have sold, sold that day, whether or not they could have been sold any other day.

Mr. PATTON: That is the very thing we object to on it seems to me a very plain ground.

The COURT: I am inclined to think as part of your case in chief it is not material.

Mr. SALZENSTEIN: That covers the balance of his testimony. The next is the deposition of.

E. J. TRANTER a witness called on behalf of the plaintiff, being duly sworn, testified as follows:—

Direct examination by Mr. TANNER:

Q. What is your business?

A. I am manager of the trotting department of the Fasig-Tipton Company.

Q. How long have you been such manager?

A. Two years.

Q. Do you know anything about the shipment of 14 horses from Mr. Kirby to your company the latter part of January, 1906?

164 A. I know that such shipment was made.

Q. Did you handle the horses?

A. No sir.

Q. Who did?

A. What do you mean by "handling them"?

(Question withdrawn.)

Q. Did you have anything to do with those horses?

A. My end of the work is purely clerical. I solicit and receive the consignments. I advertise them and endeavor to attract customers for them.

Q. Did you advertise this particular lot of horses?

Objected to by defendant. Objection sustained by the Court.

Q. Was that lot advertised for the Wednesday's sale referred to by Mr. Tipton?

Objected to by defendant. Objection sustained by the Court.

Q. Did you see any of those horses yourself?

A. I did.

Q. Mr. Tipton has referred to one mare in this lot of 14 horses shipped by Mr. Kirby as being sick, what do you know regarding her condition on the arrival of the lot at the Garden and as to her sale, and to whom she was sold?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection overruled by the Court; To which ruling of the Court the defendant by its counsel then and there excepted.

A. I know nothing about the mare's condition when she arrived in the Garden, because she arrived on Tuesday, but when she was sold Wednesday afternoon the mare was sick, very sick and was sold as a sick mare. The purchaser immediately after he bought her asked me to call for a veterinary to come down and take care of the mare and on the advice of the veterinary who came the mare was taken out of the Garden immediately.

165 Objection by defendant to what the purchaser did. Objection sustained by the Court.

Q. Was she sold without a warranty?

A. She was sold as she stands, which means without warranty.

Objected to by defendant. Objection overruled by the Court. To which ruling of the Court the defendant then and there excepted.

Q. Who was the veterinary?

The COURT: Leave that out.

Q. Who was the person to whom the mare was sold?

A. Walter M. Jermyn.

Q. What did you notice at the time regarding the condition of the horses in this shipment?

Objected to by defendant as immaterial irrelevant and incompetent. Objection overruled by the Court to which ruling of the Court the defendant by its counsel then and there excepted.

A. I paid very little attention to it.

Q. Did you notice anything particular regarding them?

A. No sir.

Q. Do you know what the name of this mare was?

A. Lou Blake.

Cross-examination by Mr. CLEMENT:

Q. You stated that you didn't have anything to do on behalf of the Company in handling the horses?

A. Yes sir.

Q. At the time they arrived at Fasig-Tipton Co.'s?

A. No sir.

Q. You stated something about one sick horse, was this one of the horses consigned in this consignment from Mr. Kirby?

A. This horse was shipped in the car with Kirby's consignment and shipped in Mr. Kirby's name.

Mr. PATTON: The balance of this is in regard to the matter that is excluded and we withdraw the cross examination.

The COURT: Let it be withdrawn.

Mr. SALZENSTEIN: Here is part of your cross examination we want in:

166 Q. All you had to do was the clerical work?

A. Largely, yes sir.

Q. Nothing to do with the actual handling?

A. No sir.

Mr. PATTON: Yes, we don't care whether it goes in or not.

Redirect examination by Mr. TANNER:

Q. You are present at the sales carried on which you advertise?

A. Yes sir always.

JOHN J. ADAMS, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. TANNER:

Q. What is your residence?

A. 559 Walton avenue, New York.

Q. What is your age?

A. 34.

Q. What is your occupation?

A. Chief Clerk of the Live Stock Department of the New York Central.

Q. How long have you been with that Company?

A. 20 years.

Q. How long have you been in the position of Chief Clerk?

A. 10 years.

Q. Are you acquainted with the schedule time of the fast freight train known as the Horse Special Train going from Chicago, Ill., to New York City over the Michigan Central and New York Central Railroads?

A. There is not now any train known as the Horse Special Train from Chicago to New York.

Q. What train has taken its place, if any?

A. We have a connection from Buffalo which carries the horses from Chicago and makes connection at Buffalo with this Michigan Central fast horse train.

Q. That does the same work?

167 A. Just the same.

Q. As the Horse Special?

A. It is a similar train, that carries high class freight and perishable freight handles horses, dressed meat or anything that requires despatch.

Q. Are high bred horses customarily sent over this line?

A. Right along, regular traffic.

Q. Were you acquainted with the schedule of this train you have just described during January 1906?

A. I was.

Q. Will you state what the schedule of time was and the connection from Chicago to New York over the lines mentioned?

Objected to as immaterial, irrelevant and incompetent, and further witness not qualified to speak and our position is we have no relation whatever to or obligation concerning this fast horse train. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. The horse train on the Michigan Central from Chicago on this date you speak of, January 25, 1906 that train left at 4 P. M. Chicago it was delivered to us at East Buffalo stock yards at 4:20 P. M. January 26. At that point they unload the horses, put them into the stock yards, feed and water them, relay the cars and reload them. All that service was performed to train at the stock yards and it left at 6:20 P. M. January 26 the following day.

Q. When did that train get into New York?

A. 8:20 P. M. January 27th, 26 hours, 140 miles.

Q. That is the only fast freight train for the transportation of stock?

A. No, we have another one that leaves in the morning at ten o'clock.

Q. Is this train that you have described first, known by the Michigan Central people as their "horse special"?

A. Their train that they run called the "horse special" makes connection with our New York Central train but is not known—

168 Q. It is known on their road as the "Horse Special"?

A. Yes, although it is known by a different name on our road, we have a different schedule.

Q. But it is known by the Michigan Central people as the "Horse Special"?

A. Yes.

Counsel for defendant moves to strike out answer. Question objected to as immaterial, irrelevant and incompetent. Motion to strike out overruled and objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

Cross-examination by Mr. CLEMENT:

Q. You are in the employ of the New York Central Road?

A. I am.

Q. You are not in the employ of the Michigan Central Road?

A. No.

Q. The statement you have made as to the schedule of this "Horse Special" train, so far as it relates to the Michigan Central schedule from what do you derive it?

A. From the table of freight trains,

Q. From no other source?

A. From the business that we handle that I know about.

Q. How do you know about it, from what people have told you?

A. No, from the reports which I receive twice a week of the arrivals of their horse trains in Buffalo to deliver their freight to us.

Q. All these reports are made by other people?

A. Made by our Agent at East Buffalo.

Q. You have no other information, you have no personal knowledge as to the times of arrival in Buffalo?

A. None whatever.

Q. The same thing is true of all the statements, they are all derived from statements of other people?

A. And our records.

169 Q. All derived from statements of other people to you?

A. Yes.

Redirect examination by Mr. TANNER:

Q. The schedules you have referred to of the Michigan Central Trains were sent to you by the Michigan Central people in the course of your duties as transportation agents of the New York Central Road?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. The schedules we have are sent to us for our convenience and for informing our patrons as to their service that we can give them on their shipments of horses and other freights from Chicago to New York.

Q. These schedules are sent by the officials of the Michigan Central Road?

A. Yes, by their transportation department to us.

Q. You speak of the information as to the times of arrival of freight trains over the Michigan Central to Buffalo as being given to you from the regular reports, what did you mean?

A. Given to us by our agent at East Buffalo.

Q. And he sends these reports to you?

A. He gives us the report of the horse train for the forwarding out of the horses from Buffalo which may arrive on their trains, stating what train it may arrive on and what time it moves out on our line, then it is up to us to see whether it is on schedule.

Recross-examination by Mr. CLEMENT:

Q. It is true, is it not, that all the statements you have made are based on statements to you by other persons?

Objected to as having been already testified. Objection overruled by the Court.

A. Yes.

170 Counsel for defendant states: I move to strike out all of the witness's testimony on this schedule time. Motion overruled by the Court, the Court remarking that this testimony tends to show the due course of business between this railroad company and the employé, and that due course of business under such circumstances is competent evidence tending to prove a possible state of facts within the field of the business.

Mr. PATTON: But the objection we make is not based on that ground, the objection we now make is based on the ground that in so far as the propositions in this case are concerned, the horse train of the Michigan Central is something with which we have nothing to do, outside of any interest we have in the case inasmuch as the alleged contract to carry by that train is ultra vires of the gentleman who made it, and ultra vires of the corporation because it is forbidden by the law.

The COURT: For the time being the objection is overruled. To which ruling of the Court the defendant by its counsel then and there excepted.

Redirect examination:

Q. The information which you have testified to is official information received in the regular course of your business as chief clerk of the Live Stock department of the New York Central road is it not?

Objected to as immaterial, irrelevant and incompetent and especially to the word "official."

A. It is absolutely official and correct.

MR. PATTON: Well, I have made the motion that I want in already and there is no use repeating it.

ROBERT W. McCULLY, a witness on behalf of plaintiff, being duly sworn, testified as follows:

171 Direct examination by Mr. TANNER:

Q. Dr. McCully, what is your age and residence?

A. I reside at 146 East 22nd street, New York. I am 36 years of age.

Q. What is your occupation?

A. I am a veterinary doctor.

Q. How long have you been in that business?

A. 16 years.

Q. Where did you receive your education, Dr. McCully, and your training as a veterinary?

A. At Ontario Veterinary College, Toronto.

Q. When did you graduate?

A. 1890.

Q. Have you been practicing as a veterinary ever since?

A. Yes.

Q. Do you know N. T. Kirby, the plaintiff in this action?

A. Yes sir.

Q. How long have you known him?

A. Since last January, I met him last January.

Q. Do you remember being called to treat a certain mare in a shipment of horses by Mr. Kirby to the Fasig-Tipton Company the latter part of January, 1906?

A. Yes.

Q. At Fiss, Doer & Carroll's stables?

A. Yes sir.

Q. Who called you there Doctor?

A. Mr. Kirby notified the superintendent and the superintendent of the stable called me, called me for Mr. Kirby.

Q. Who did you find in charge of the mare when you called at the stables?

A. I don't know the man's name.

Q. One of the employés of Fiss, Doer & Carroll?

A. No, one of Mr. Kirby's employés.

Q. You don't remember his name?

A. No sir, I don't know his name.

172 Q. Do you know the name of that mare?

A. I believe it was Lou Blake, he told me it was Lou Blake.

Q. Dr. McCully, will you describe her?

A. She was a chestnut mare, about 15 hands 3 inches high. I am speaking just from general memory. I am not describing her accurately. I didn't know I would be asked.

Q. Describe her more particularly if you can?

A. I couldn't; I cannot.

Q. What was the condition of that mare?

A. The mare when I saw her was sick, her temperature was 105½ pulse 80 and weak. Showed all signs of having had a severe chill and congestion of the lungs.

Q. How long did you have charge of her?

A. I think three days—four days.

Q. You made a thorough examination of her condition didn't you?

A. Yes sir.

Q. What in your opinion caused it?

Objected to as immaterial, irrelevant and incompetent, witness not qualified to speak. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Possibly the exposure. The exposure I should say.

Q. Could that condition be caused by a continued shipment of several days?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. Did I understand you to say that such a condition would be caused by the delay of a shipment of this mare from the 25th of January to the 29th of January if she continued on the road?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the court 173 the defendant by its counsel then and there excepted.

A. Yes sir.

Q. That is your best knowledge and belief as a veterinary surgeon?

A. Yes sir.

Q. Do you know anything about her sale at the Madison Square Garden?

A. Only what I heard.

Q. Do you know what her condition was at the time of the sale?

A. Yes sir.

Q. What was it?

A. The mare had a temperature of 103 and was weak, she shouldn't have been moved.

Q. That was a continuation of the same trouble for which you had originally treated her on the first day you saw her?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. And according to your experience as a veterinary you believe

that her condition at the time of the sale was the result of this delay in shipment, that I have mentioned?

Objected to as immaterial, irrelevant and incompetent, and that the witness is not qualified to speak. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. What was your bill for your services to this mare Lou Blake before the sale?

Objected to as immaterial, irrelevant and incompetent.

The COURT: There is nothing in the bill of particulars about that is there or the declaration.

Mr. SALZENSTEIN: No.

174 The COURT: Well the objection is sustained and the veterinary bill will not be considered by you gentlemen of the jury.

Cross-examination.

By Mr. CLEMENT:

Q. What time of the day did you first see this mare?

A. I should think about four or five o'clock.

Q. On what day?

A. On January 29, 1906.

Q. You have testified, if I remember rightly, that this high fever and chills might have been caused by exposure?

A. Yes sir.

Q. It might have been caused by anything else?

A. I don't know what else could have caused it.

12 Q. It is possible it might have been caused by exposure between 12 o'clock that night and 5 o'clock when you saw her?

A. She was in no place where she could have been exposed.

Q. If she had been in a place where she might have been exposed, it might have been caused by such exposure?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court.

A. Her condition was so that it could not have been possible for it to have been caused by exposure between 12 o'clock and five, she was too far advanced in the disease.

Q. Was it impossible to have been caused between nine o'clock and five?

Objected to. Same objection. Also that there is proof tending to show that she was in the possession of the railroad company at nine o'clock of that morning. Objection overruled by the Court.

A. From nine o'clock, yes, it would be possible.

Counsel for plaintiff moves to strike out the answer. Motion overruled by the Court.

Q. From ten o'clock?

Same objection. Objection overruled by the Court.

A. Yes, that would be possible.

Q. Did you see this mare between 12 o'clock and 5?

175 A. Yes, between twelve and five.

Q. Between twelve and six?

A. Yes.

Q. When was the first time you saw her?

A. Between four and five.

Q. Did you see her before or after four?

A. It might have been four, possible before—just when I cannot remember, between four and five.

Q. Certainly not before four?

A. No.

Q. Any time before four?

A. No sir.

Q. Then your statement that she was kept in such a place that this conditions of fever and chills &c. would not have been cause is all based on the statements of somebody else to you?

A. No, when I got there I know what kind of a place she was in.

Q. How do you know she was kept in that place between 12 o'clock and four?

A. I don't see why she should be moved.

Q. How do you know she was kept in that particular place and had been there since 12 o'clock?

A. They insist upon it.

Q. How do you know?

A. They told me.

Q. You only know it because they told you?

A. I wasn't there at twelve.

Q. Someone told you?

A. Yes.

Redirect examination.

By M. R. TANNER:

Q. You have testified that this condition of fever and general physical condition of the mare was caused by exposure?

A. Yes sir.

176 Q. And that a short exposure of a few hours would not account for that condition?

A. No, she was too far advanced in the disease.

Q. In your opinion was it not too long exposure, reaching back over a period of several days that caused it?

Objected to as irrelevant, immaterial and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. I would have to answer that question as just the result of my experience in shipping horses and I should say yes.

Q. That it was from exposure of several days?

Objected to. Same objection. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. This mare was a high bred mare, Doctor, wasn't she?

A. Yes sir.

Q. Trotting mare?

A. Yes sir.

Q. You have had considerable experience I presume with high bred stock?

A. Yes sir.

Q. What would be the effect of a delay on the cars in shipping this kind of a mare, from January 25 to January 29th, would it produce the condition you observed in this mare?

Objected to as immaterial, irrelevant and incompetent. Witness not qualified to speak, and assuming a state of facts not proved. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes.

By Mr. TANNER:

Q. It is not very probably is it?

177 Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. No it is not.

Q. Did you notice any other of the horses in the shipment of Nathaniel T. Kirby?

A. No sir.

Q. You did not treat any other horses?

A. No sir.

Mr. SALZENSTEIN: Subject to objection this is the schedule of that Fast Horse Train?

The COURT: There is produced what is admitted to be the schedule of the running time of the Horse Special, which is offered in evidence by the plaintiff, the defendant objects to its admissibility on the ground that the defendant denies there was any special contract between the plaintiff and the defendant concerning or with reference to the Fast Horse Train, and on the further grounds that were any special contract made it would be illegal, invalid and wholly void, and therefore the testimony as to the actual time or schedule of the Fast Horse Train is inadmissible, irrelevant and immaterial in this case, no objection is made to the form of the contents but only to the substance as above stated, and the objection is overruled by the Court and the schedule admitted in evidence.

To which ruling of the Court the defendant by its counsel then and there excepted.

Said schedule so offered in evidence being in the words and figures following to-wit:

C. B.—4. (Domestic Horse Special.)
Union Stock Yards to Buffalo.
Character—Horse Special.

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	Arriving time.	Leaving time. Connections.
U. S. Yards.....	5.00 P. M.
Niles.....	9.00 P. M.	9.05 P. M.
Jackson Jet.....	1.05 A. M.	
Detroit.....	3.40 A. M.	4.00 A. M.
Windsor.....	4.10 A. M.	4.40 A. M.
St. Thomas.....	8.50 A. M.	9.10 A. M.
Victoria.....	3.00 P. M.	3.30 P. M.
Black Rock.....	4.00 P. M.	
East Buffalo.....	5.00 P. M.	

This train will run on Thursday or other days on special order.
U. S. Yards.—Takes Horses for Buffalo and points East. Fills out
with Other Live Stock.

N. T. KIRBY being recalled in answer to interrogatories propounded
by Albert Salzenstein, Esq., testified as follows to-wit:

Q. What care was taken of Lou Blake and there other horses from
the time you reached New York up to the time they — sold?

A. Just as good care as we could of them with my own foreman.

Q. Where were they first placed?

A. At Fess, Doer & Carroll's.

Q. What character of stables are those, were they at that time as
far as healthy condition and the like?

A. They were very fine stables, I don't see how I could get in any
better.

Q. As to warmth how were they, how protected from the cold?

A. Well, it is a splendid stable with a place to exercise if you
want to around inside without having to go outside you didn't
have to go outside for anything.

Q. How was it protected from wind and storms and cold?

A. Well, the stalls were very high partitions, were very high, and
it was a large building, no drafts.

Q. What care was taken of those horses and the mare Lou Blake
while at Fess, Doer & Carroll?

A. I had my foreman with me, he took charge of them and
helped take care of them, and the details, all the men I wanted to
help me in the stable, so I spared no pains in taking the best of care
of them.

Q. What kind of care did they have when taken to Madison
Square Garden?

A. Just the same care that I took up there.

179 Q. Now how are the stables at that place, the conditions for taking care of horses, protecting them from cold wind and so on?

A. The stables are beneath the track and all heated by steam, and a splendid place to take care of them.

Q. How about drafts, anything of that sort there?

A. There is no drafts unless you drop the window to make it so.

Q. What kind of care did they have while there?

A. The very best.

Q. I don't know whether I covered this in the right direction in regard to the charge of \$200.50 transportation charges, did you ultimately pay this?

A. Yes sir, it was charged to me in the returns from Easig Tippon & Company after the sale?

Witness on cross-examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. What time did you say the horses arrived at 130- street station?

A. Between six and eight o'clock, I think about eight o'clock in the morning.

Q. That was in the early morning?

A. Yes sir.

Q. Where were they from the time they arrived up to the time they went into Fess, Doer & Carroll's stables about noon, it was about noon was it not?

A. Yes sir.

Q. Where were they?

A. They were there standing waiting for the engine to take them down to unload at Fess, Doer & Carroll's stables.

Q. Still in the car?

A. Still in the car, yes.

Q. From the time that you arrived at 130- street until the time you got them into Fess, Doer & Carroll's stables?

A. Yes sir.

Q. Switched in?

180 A. Not switched in but stopped at crossings, delayed on account of crossings of railroads and such as that until they got their signals to move on.

Q. That handling and delay was an aggravation of any trouble that might already have been done was it not?

A. Oh, yes, in the same line.

Q. You cannot tell how much that contributed or how much the previous delay had done?

A. No sir, there is no way to figure that.

Q. Mr. SALZENSTEIN: In regard to that, it was hardly cross examination but to bring that out, what kind of movement was there of this car from 130 street to these stables of Fess, Doer & Carroll's?

A. Just simply a slow steady move, and when they come to a crossing they would stop until they got the signals to go on, then they would move on weaving its way down through the city.

Q. How were those delays you speak of compared with the delay

you had been subjected to prior to getting to 130 street you have already spoken of?

A. Very different, because there was no jerking of cars or switching of backward and forwards.

Q. You have spoken about the distance of Fess, Doer & Carroll's stables being four or five miles to 130 street, those blocks how do they compare with our streets in this city.

A. I don't know how many blocks it takes for a mile there, but it seemed to me like they were larger blocks than here, of course a difference between 130 street and 30 street which Fess, Doer and Carroll are on.

Q. Some additional blocks besides those you have mentioned?

A. Yes sir.

Q. Turning?

A. Yes sir.

Q. You can't tell how many miles it is then?

181 A. No, it wasn't straight away down of course.

Q. These horses were in the same car they had been in?

A. Yes sir.

Mr. SALZENSTEIN: The schedule time I understand is in the record and I won't read that to the jury now, that part of the pamphlet relating to this train or horse special.

Here plaintiff rested his case, whereupon the defendant to sustain the issues on its behalf introduced in evidence that is to say:

R. W. STUTTSMAN, being first duly sworn in answer to interrogatories propounded by William L. Patton, Esq. testified as follows to-wit:

Q. What is your name?

A. Robert W. Stuttsman.

Q. Where do you live?

A. Springfield

Q. What is you business?

A. Live Stock Agent for the Chicago and Alton Railroad.

Q. You were in the same business in January 1906 were you?

A. Yes sir.

Q. Just tell the jury what your duties are and were at that time as live stock agent of the Chicago & Alton railroad Company.

Q. Soliciting stock shipments for different markets for the Chicago & Alton Railroad.

Q. What do you mean by soliciting stock shipments?

A. Shipments that is from the territory covered by the Chicago & Alton Railroad business to go on that road to the different markets for the revenue that is in it.

Q. What do you have to do, or then had to do if anything with making the contract of shipments?

A. We don't make no contracts for shipment.

Q. What had you personally as Live Stock agent to do with making contracts with the people that you solicited business from?

182 A. Well, really we don't make any contracts.

Objection by plaintiff to the answer.

Q. That is what you had personally to do if anything with the making of the contracts of shipments with the person you solicited shipment from?

A. None whatever.

Q. What power or authority had you at that time to contract concerning the terms of the shipment with the shipper or the prospective shipper?

A. Well, I would have no power to make any kind of contract, just simply putting up the Chicago & Alton Railroad for that purpose putting their road before the shipper, there is the Chicago & Alton Railroad and we would like to have the shipment.

Q. Now, to whom after you solicited the business would you refer the shipper with reference to rates and so on?

A. The different agents at the different stations.

Q. The freight agents of the road?

A. Yes sir.

Q. I will ask you if you know Mr. Kirby?

A. I have met the gentleman several times.

Q. I call your attention to the shipment of some horses out of Springfield for New York in January 1903, what did you have to do with reference to soliciting that shipment?

A. Well I saw Mr. Kirby in regard to the shipment for New York.

Q. Where did you first see him?

A. I think possibly it was there at his shop there on Jefferson street.

Q. Well now, how did you know, how did you learn that he had stock to be shipped?

A. From one of our passenger agents or ticket agent there in the passenger station told me. Mr. Kirby had a shipment going to New York, if I wanted to see some one that I could see what to do with the shipment through for him.

183 Q. That was Will Connors, was it?

A. Yes sir, Will Connors.

Q. In pursuance of that information did you go to Mr. Kirby's shop?

A. Yes sir.

Q. For what purpose did you go?

A. I went for the purpose to see if I could get him to make that shipment over the C. & A. Railroad.

Q. What information did he give you with reference to the kind or character of stock it was that he wanted to have shipped?

A. He told me had a car of horses to go to New York.

Q. Did he tell you what kind of horses?

A. No sir.

Q. Did he tell you that it was a car of high bred trotting and packing stock?

Q. Never a word said about any particular stock of race horses.

Q. What if anything did he say to you about it being anything other than simply horses?

A. Nothing whatever.
Q. What did he tell you about where he wanted the horses shipped to?

A. Well, now you mean the destination, what street?

Q. Yes?

A. I don't remember just what destination any more than he wanted to go to New York.

Q. Did he tell you of any particular market that he wanted to send the horses to?

A. He mentioned there was going to be a sale commencing a certain date, I can't recall that date, and he wanted to be there on that market.

Q. Do you remember during how many days he told you that sale was to subsist?

A. He didn't say.

184 Q. What if anything was said about there being any necessity for the horses to get there on any particular day?

A. Nothing whatever.

Q. What knowledge if any did you have of any reason or necessity for the horses to arrive in New York on any particular day?

A. Nothing whatever, he simply wanted to be there on that market commencing I think on Tuesday, I don't remember which day it was now.

Q. For how many days about did that market run if he told you?

A. He didn't say.

Q. Now did he at that time say anything about the route that he wanted his horses to take?

A. Well, nothing special with the exception he wanted the best way to go.

Q. What did you tell him about that if anything?

A. I told him to go to Chicago and go over, he mentioned the fact he wanted to catch a certain train in Chicago.

Q. That is what I want you to tell me about?

A. I told him I didn't understand the situation in Chicago of the connecting lines enough to know but I would find out for him.

Q. First when did he tell you about his desire to catch a certain train?

A. Well he told me he wanted a special horse train, a friend of his shipped from Omaha to New York always went on a certain train and he went by Joliet.

Q. What did you tell him now in regard to that?

A. I told him there was a man named Donald at Lincoln Illinois, who was shipping horses every week, and I would go and see him and see how he was shipping horses, and I found out Mr.

Donald—

185 Q. On that occasion did you and he go any place from his shop?

A. Not at that time no sir.

Q. Did you and he go together over to the C. & A Freight Depot on that occasion?

A. We went over there in regard to the rate and in regard to a special car they had to have for that shipment.

Q. Explain to the jury what you mean by a special car?

A. He wanted what is called a Burton-Arms palace car, a car specially for horses, stalled off for horses.

Q. Who is it that arranges for these special cars, the railroad company or the shippers, the railroad company for the shipper or how?

A. The shipper handles that himself, but we have always practiced if a man wanted a Burton stock car, special car, we would order the car for him.

Q. Is that a part of the rate that a railroad gets as compensation for this car, or does that fare go to somebody else?

A. That goes to a prize car company.

Objected to by plaintiff as immaterial.

The COURT: It is part of the details, I think it might as well go in.

Q. Now on this occasion what if anything was said by Mr. Kirby about wanting a special horse car?

A. I think mentioned the fact what kind of a car he wanted to ship horses in, and left him to Mr. Eggleston I think him and I went over to see Mr. Eggleston at that time about the car.

Q. Now at the freight depot what conversation if any was had in the presence of you and Mr. Eggleston by Mr. Kirby with reference to the route he wanted these horses to go?

A. Well, Mr. Kirby wanted to go by way of Joliet, this friend of his had insisted on it.

Q. Was that conversation in Mr. Eggleston's presence?
186 A. Yes sir.

Q. Tell the jury what that was?

A. Well he mentioned the fact he would catch this Michigan horse train at Joliet and that is the way he wanted to go, he wanted to know if we could get there in time in the morning to catch that train, our train was due in Joliet I think at six o'clock in the morning.

Q. What was said by you about the proper way to go to the fast horse train if anything?

A. I told him I would look into that and see how we made those connections there at Joliet with the Michigan Central people, he wanted to go by the Michigan Central.

Q. By the fast train on the Michigan Central?

A. Yes sir.

Q. If you made any investigation with regard to the connection tell the jury what investigation you made?

A. Well I didn't understand the connection at Joliet, the different connections with the eastern lines and I goes up to Lincoln, Mr. Donald was a shipper who shipped a car every week from Lincoln, Illinois, to New York, did at that time.

Q. If you found out from Mr. Donald the connections which were

proper to be used in order to get the fast horse train tell the jury what they were?

Objected to by plaintiff.

The COURT: I understand that was communicated to the plaintiff later. I understand that the purpose is to show he communicated that information to the plaintiff.

Mr. PATTON: Yes sir.

The COURT: Upon that theory I think it ought to go in.

Q. What did you learn?

A. Mr. Donald told me that he always shipped by Chicago and the stock yard, he got to Chicago and the stock was unloaded 187 in the yard and then loaded up for the special train.

Objected to by plaintiff as not responsive to the question.

The COURT: I understand the purpose is to show that you communicated that.

Mr. PATTON: That he come back from Donald and told Kirby this very thing?

The COURT: Get right to it, if he had any conversation with Mr. Kirby about what he learned from Donald what did he tell Kirby.

Q. If you had after your trip to Lincoln a conversation with Mr. Kirby in the presence of anybody in regard to the movement that you found out about, in whose presence was that?

A. I went to Mr. Kirby's office and found Mr. Kirby in there and possibly other gentlemen in the ship there working I told him I had him fixed up all right I had learned by going by Chicago they could make that train at Chicago.

Q. What did he say to that?

A. He objected to going to Chicago, he had to go by Joliet, his friend from Omaha told him to go by Joliet and catch this train, the same fast stock train that left there.

Q. Now what more was said about it?

A. Well there was I don't know, just recollect what was particularly said.

Q. When was it after the time that you and Mr. Kirby went over to the freight depot and had a conversation with Mr. Eggleston about this thing?

A. Well, that was before, then we goes over again in regard to the car.

Q. I want to get what was the first conversation when Mr. Kirby and you and Mr. Eggleston were present with reference to this movement of the case?

A. Well, that was the first time I think I seen Mr. Kirby.

Q. That is what I want you to tell about?

A. We wanted to send the shipment by way of Chicago 188 and insisted on the shipment going by Chicago all the time.

Q. Who was present at that conversation when you was insisting on the shipment going by Chicago?

A. Mr. Eggleston and I and Mr. Kirby.

Q. Where?

A. In the freight depot.

Q. Was that the first day you had talked with Mr. Kirby?

A. Yes, we talked there that day, and he wanted to go by Joliet, his friend wanted him to go by Joliet.

Q. In pursuant of his insistence about that what did you do with reference to making any inquiries as to the Joliet route?

Objected to by plaintiff as having been gone into before.

Q. I want to get it in sequence of time.

The COURT: The objection is overruled.

Q. After the talk between you and Mr. Egelston and Mr. Kirby was there another talk with Mr. Kirby about this same proposition?

A. Yes sir, that is after I found out that the shipment had to go by Chicago to make that train.

Q. What was that conversation and where was it?

A. That was in his shop some time after, several days, probably a couple of days afterwards, I got right on the train when I told him I would and *when* to Lincoln to see about it, how Donald shipped.

Q. After you come back from Donald you had this conversation in the shop?

A. Yes, sir.

Q. Now did you on the first or second occasion or on any other occasion contract or agree with Mr. Kirby that the Chicago & Alton Railroad Company would take his stock and would catch any particular train either through Joliet or out of Chicago?

A. No sir, no sir, we don't make any such contracts.

189 Objection by plaintiff to the last part of the answer and ask to have it stricken.

The COURT: The last part of the answer is stricken, it is not material what kind of contracts you do make, the question is what did you say to this man?

A. I made no contract.

Q. Did you say to him that you would guarantee that the stock would catch the fast horse special leaving Chicago at about 3 o'clock on Thursday, January 25th?

A. No sir.

Q. Did Mr. Egelston in your presence say that or that is substance?

A. I never heard it stated at all.

Q. What was the position taken by you and by Mr. Egelston with reference to the movement of this train at all times if you had any position?

Objected to by plaintiff. Objection sustained by the Court.

To which ruling of the Court the defendant by its counsel then and there excepted.

Q. Well what was said to Mr. Kirby by you or by Mr. Egelston in your presence with reference to what was the proper movement

of this car load of stock in order to catch that fast horse special out of Chicago.

A. I told Mr. Kirby it would have to go out on our number 8 which leaves here a little after 8 o'clock in the evening and go to the Chicago Stock Yard.

Q. What objections if any did he make to going to the stock yard and what reasons did he give?

A. He didn't want to go by the stock yards and be switched around the stock yard and didn't want to pay the two dollars extra stock yard charge.

Q. What reason did he give for wanting the Joliet movement if he gave any reason?

190 A. Nothing with the exception he didn't want to go through Chicago and be switched around through Chicago.

Q. What information did he say he had, if he said he had any information, about the feasibility of making the Joliet movement?

A. He said he had a friend that shipped from Omaha to New York and his friend told him to ship, to have them go by way of Joliet, to make that train by way of Joliet and he wanted to go by Joliet.

Q. What did you have if anything to do with the making of the agreement of shipments, or contracts of shipments between Mr. Kirby and the Chicago & Alton Railroad?

A. Nothing at all.

Q. What was your office in the transaction, what did you do?

A. I just simply went to Mr. Kirby and offered him our services for Chicago.

Q. What did you say at any time during the transaction with reference to offering or agreeing or guaranteeing to catch the fast horse special by way of Joliet?

A. I didn't make, I didn't give him no agreement of any kind.

Q. What did you know if anything with reference to the movement of the Michigan Central trains out of Joliet with reference to their connection or possible connection with the fast horse special.

Objected to by plaintiff. Objection overruled by the Court.

A. Nothing at all with the exception of their time card shown in the official guide.

Q. What was the first you learned or heard of a possibility of catching the fast horse special out of Joliet and from whom did you learn it?

191 A. From Mr. Kirby.

Q. Were you present at any time when Mr. Kirby was at the depot inquiring about the rates of shipments?

A. Well, nothing only when Mr. Kirby and I went there together to see about the rate and about the special car that he wanted to get.

Q. I presume you didn't know anything about the rate proposition?

A. No I did not. I think we gave him a rate at that time.

Q. Whose business was it if you know to look up and give the information about the rate?

A. Well, Mr. Egleston our freight agent there; well I would have to go to some official to get the rate, I could not make the rate myself. I would have to go and get the rate the same as Mr. Kirby had, he had access to the rate the same as I would.

Q. When you say that Mr. Kirby had the same access to go and get the rate the same as you had, what do you mean?

A. Why to go to some agent and get the rate, the same local agent.

Q. What documents if any were kept in the local freight depot here at Springfield from which the local freight agent or any body else could ascertain the joint interstate rate between Springfield and New York?

Objected to by plaintiff as improper and leading in view of the questions preceding. Objection overruled by the Court.

A. The public has access to the rates at any time they desire to see a rate at any given point, from any point to another point.

Q. Was the official classification and the joint interstate rate on file in the office of the local freight agent at Springfield at the time of the conversation that you are talking about with Mr. 192 Kirby?

A. Yes sir.

Q. I show you a book marked on the cover Official Classification Number 27 to take effect January 1, 1906 superseding Official Classification Number 26 subject to change without notice except such as is required under the interstate commerce law, and I will ask you what that is?

A. Well, that is a classification of freights, of commodities to arrive at a rate.

Q. Was a copy of that on file in the office of the local freight agent at Springfield at the time of this jammering back and forth between you and Mr. Kirby?

Objected to by plaintiff as leading and immaterial and irrelevant to the issues, whether it was on file or not on file we say cuts no figure.

The COURT: I am rather disposed to overrule the objection and allow the answer to come, of course with reference to this matter in the end I will have to instruct the jury when we see what the case develops, I don't feel safe in excluding it.

Q. Was there a copy of that in the office, was there or was there not?

A. Yes sir.

Q. State what was the situation with reference to the access of the public to that official classification?

A. The public has access to these rates, and this is a part of the rate and all they have to do is to come and ask.

Q. What if anything was there in the public part of the railway station with reference to notice to the public in regard to their access to these rates?

A. They have notices posted in all stations.

Q. Was there such notice published in this station?

A. Yes sir.

C.&A. GFD16500
OFFICIAL CLASSIFICATION
GFD13500

LASSIFICATION

NO. 27.

) TAKE EFFECT JANUARY 1, 1906.
(Signature)

SUPERSEDING OFFICIAL CLASSIFICATION No. 26.
(Signature)

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